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IN THE

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1993

ANA M. OLIVAREZ, WARDEN OF THE
DEUEL VOCATIONAL INSTITUTION
OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MICHAEL SHERIDAN MCKINNEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT
(AFTER GRANT OF CERTIORARI AND REMAND)

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the introduction of character evidence to show propensity in a closely-balanced case constitutes *per se* a violation of Due Process and, if so,

2. Is the application of such a rule contrary to *Teague v. Lane*, 489 U.S. 288 (1989) as applying a "new rule" for the first time on collateral review?

3. If a state appellate court has found that permissible inferences were raised by certain evidence and that the evidence was probative of issues in dispute, are such findings binding under *Sumner v. Mata*, 449 U.S. 539 (1981), as facts which the collateral reviewing court must treat deferentially or are such findings legal conclusions which the collateral reviewing court can completely ignore?

4. Separately, does the failure by the collateral reviewing court to recognize the permissible inferences found by the state appellate court violate this Court's holding in Estelle v. McGuire, 502 U.S. ___, 112 S. Ct. 475, 116 L.Ed.2d 385 (1991) by ignoring the permissible inferences to be drawn from the introduction of the evidence, rather than, as in Estelle, finding that the permissible inferences do not relate to a matter in dispute.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed April 28, 1993 as amended on June 10, 1993, in No. 89-55869 (993 F.2d 1378 (9th Cir. 1993)), is attached hereto as Appendix A.

On September 10, 1993, the Court of Appeals issued an order denying the

petition for rehearing and rejecting the suggestion for rehearing *en banc* which is attached hereto as Appendix B.

On January 13, 1992, this Honorable Court issued a decision (see Gomez v. McKinney, 112 S. Ct. 859, 116 L. Ed. 2d 767 (1992)) granting certiorari, vacating the previous opinion and remanding this case to the Ninth Circuit for further consideration in light of Estelle v. McGuire, 502 U.S. ___, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). A copy of this decision is attached as Appendix C.

On September 5, 1990, the United States Court of Appeals for the Ninth Circuit issued its original opinion in this case, a memorandum decision not for publication, a copy of which is attached as Appendix D. Petitioner's petition for rehearing of that decision and suggestion for rehearing en banc was denied in an

order attached hereto as Appendix E.

On June 19, 1989, a United States Magistrate-Judge issued a "Report and Recommendation of United States Magistrate on a Petition for Writ of Habeas Corpus by a Person in State Custody." On July 27, 1989, the United States District Court for the Central District of California issued an "Order Adopting Findings, Conclusions, and Recommendations of United States Magistrate." On July 31, 1989, a "Judgment", which granted the writ of habeas corpus, was issued in favor of respondent. These orders are attached hereto collectively as Appendix F.

On February 19, 1988, a United States Magistrate issued an "Order" holding that respondent had exhausted his state remedies and ordering petitioner to file a return on the merits to the petition for writ of habeas corpus which

is attached hereto as Appendix G.

On September 24, 1986, the California Supreme Court issued an order denying respondent's petition for writ of habeas corpus which is attached hereto as Appendix H.

On July 24, 1986, the California District Court of Appeal for the Second Appellate District, Division One, issued an opinion affirming the conviction which is attached as Appendix I.

JURISDICTION

The date of the judgment which petitioner seeks to have reviewed is June 10, 1993, amending a decision issued on April 28, 1993. See Appendix A.

A petition for rehearing was denied on September 10, 1993. A suggestion for rehearing *en banc* was also rejected on September 10, 1990. See Appendix B.

The jurisdiction of this Court is

invoked pursuant to Title 28, United States Code, section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(a):

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On December 19, 1984, respondent, who brutally slit his mother's throat, was convicted by jury in a state court in

California of murder in the first degree, a violation of California Penal Code section 187. The state jury also found true a special allegation that in the commission of the offense, respondent had personally used a knife, which use was not necessarily an element of the offense, within the meaning of California Penal Code section 12022(b). Respondent was sentenced to state prison for the term prescribed by law, 25 years to life, for the offense of murder and was sentenced to serve one year for the special knife use allegation found true. Clerk's Transcript, p. 158[1]/.

Respondent appealed his conviction to the California Court of Appeal,

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1. Copies of the Clerk's Transcripts and the Reporter's Transcripts of the trial were lodged below as Docket Number 10 and are hereinafter referred to, respectively, as "CT" and "RT."

contending, *inter alia*, that the trial court had allowed overly prejudicial evidence, to wit, prior ownership of, and fascination with, knives. On July 24, 1986, respondent's conviction was affirmed by the California Court of Appeal, Second Appellate District, in an unpublished decision. Appendix I.

Respondent attempted to obtain direct review of the decision of the California Court of Appeal by filing, in the California Supreme Court, an untimely Petition for Review which was rejected for filing. Respondent then filed a Petition for Writ of Habeas Corpus in the California Supreme Court. This petition was denied without comment or citation to authority. Appendix H.

Respondent then filed the instant petition for writ of habeas corpus in the United States District Court for the

Central District of California in which he alleged, *inter alia*, that his due process rights had been violated based on his allegation that overly prejudicial evidence, to wit, knife ownership and fascination, had been admitted at his state trial.

Petitioner then filed a return on the merits. Docket No. 9. The United States Magistrate-Judge subsequently issued a "Report and Recommendation of United States Magistrate on a Petition for Writ of Habeas Corpus by a Person in State Custody" which found that the prejudicial character of the knife ownership and fascination evidence outweighed its probative value and that the "error" in the admission of the evidence had a likely effect on the outcome of the trial and, thus, respondent's due process rights were violated and the writ should be granted.

Appendix G. Judgment granting the writ of habeas corpus was issued in favor of respondent on July 31, 1989. Appendix G.

On August 10, 1989, petitioner filed a "Notice of Appeal" of the judgment of the United States District Court. Docket No. 30. On November 20, 1989, petitioner filed an appellant's brief in the Court of Appeals for the Ninth Circuit. On September 5, 1990, the United States Court of Appeals for the Ninth Circuit, in No. 89-55869, issued a memorandum decision affirming the judgment of the United States District Court and found respondent's trial to be fundamentally unfair in violation of his constitutional right to due process. See Appendix D.

On September 11, 1990, petitioner filed a petition for rehearing and suggestion for rehearing *en banc*. The petition for rehearing and suggestion for

rehearing *en banc* was denied on November 30, 1990. See Appendix E.

On or about January 29, 1991, petitioner filed, in this Court, a "Petition for Writ of Certiorari." On January 13, 1992, this Court granted the petition for writ of certiorari and remanded this case back to the Ninth Circuit Court of Appeals in light of Estelle v. McGuire, 502 U.S. ___, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). A copy of this decision is attached as Appendix C.

On April 28, 1993, the Ninth Circuit Court of Appeals issued a decision again affirming the judgment of the United States District Court granting the writ. On June 10, 1993, the Ninth Circuit Court of Appeals issued an Order amending the opinion. See Appendix A.

On September 10, 1993, the Ninth

Circuit Court of Appeals denied petitioner's "Petition for Rehearing and Suggestion for Rehearing *En Banc.*" See Appendix B.

STATEMENT OF FACTS

On January 28, 1984, at 11:30 p.m., respondent's adoptive mother was found dying at home from four cuts to her body, one slash to the throat and three chest wounds. The state court jury rendered a special finding of fact that respondent had personally used a knife in the commission of murder and enhanced respondent's sentence by reason thereof. C.T. 158.

Respondent testified that, on the night of the murder, he had left the house for the movies earlier in the night and had come home at 11:00 p.m., dozed off, and found his adoptive father holding his mother at 11:30 p.m. Respondent's

adoptive father, Quentin McKinney, a long distance trucker had just returned from a trip on the night of the murder, and he testified that after an argument between respondent and his wife, he had gone to sleep at 8:30 p.m. and had awakened at 11:30 p.m. to find his wife dying of the wounds. R.T. 83.

A pair of ski gloves, which respondent denied were his but which one of his female associates from Canada stated were similar to gloves she had seen him wear, were found to bear the victim's blood. R.T. 903. In addition, a pair of camouflaged pants belonging to respondent were soaked with the victim's blood. R.T. 217-218. The tee-shirt worn by Quentin McKinney when he held his wife also contained the victim's blood. However, a Buck knife Mr. Quentin McKinney was wearing was taken by the police, examined,

and found to contain no blood whatsoever, despite the fact that he had been holding his bleeding wife and wearing the knife for a considerable amount of time. R.T. 192-193, 347, 349.

The residence was a secured dwelling and there were no signs of forced entry. R.T. 190. The argument between respondent and the victim concerned respondent's attempt to borrow $3,000 from the father to continue school and the victim's opposition to that request. The father had stated that he would go to sleep and decide whether to make the loan after he awoke. R.T. 64-67.

The murder weapon was never recovered, but the Coroner testified that two weapons presented to him for display could have inflicted all four wounds. R.T. 496, 497. One weapon presented to the Coroner, which was purchased by the

prosecution, was a replica of a Gerber dagger once owned by petitioner and confiscated in September by the police. The second weapon was a Tekna dagger that was surrendered to the prosecutor by respondent's best friend, Constantine Potamianos, after the murder. Potamianos told the prosecutor, however, that respondent had made a gift to him of the dagger three months prior to the murder. R.T. 414, 416.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner urges that a writ of certiorari should be granted for the following special and important reasons:

A. The decision of the Court of Appeals for the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this

Court's power of supervision" (United States Supreme Court Rules, Rule 10.1.(a)) in that:

1. The decision (a) wrongfully extends federal habeas corpus jurisdiction into state court trials by holding that in a closely-balanced case, the introduction of character evidence solely to show propensity constitutes "Due Process error" and thus, (b) creates a "new rule," applied for the first time on this collateral review in violation of Teaque v. Lane, 489 U.S. 288 (1989); and,

2. The decision violates this Court's decisions in Estelle v. McGuire, supra, and

Sumner v. Mata, supra, by completely ignoring "inferences" that the state appellate court found could be drawn from the evidence and substituting its own opinion as to whether the "inferences" the state appellate court found could have actually been drawn at all.

ARGUMENT

I

CHARACTER EVIDENCE2/ SHOULD NOT BE DEEMED TO BE INTRINSICALLY VIOLATIVE OF THE FEDERAL CONSTITUTION

The Ninth Circuit decision here has undertaken what is perhaps the boldest step in American Jurisprudence in the last few decades. Traditionally, the United States Supreme Court has jealously guarded the rights of the States to conduct their own criminal trials without undue interference by the federal government. Donnelly v. De Christoforo, 416 U.S. 637, 642 (1974).

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2. Petitioner wishes to make clear at the outset that it strongly disagrees that the evidence introduced in the trial court below was either "character" evidence or that it was introduced "to show propensity." In fact, as urged by Petitioner to no avail in many prior pleadings before the Ninth Circuit, the evidence in question was habit, custom,

Striking at the heart of that protection, the Ninth Circuit has now decided that there are "rule-like" federal constitutional limitations to the introduction of ordinary evidence in state criminal trials, even when that evidence does not violate any specific constitutional guarantee or is not itself so patently offensive as to violate due process. Specifically, the Ninth Circuit has zeroed in on "character evidence" and has, by this decision, created a "rule" that it is federal constitutional "error," in a closely-balanced case, for a state criminal trial to allow introduction of character evidence that is not probative of any issue (or does

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2. (cont.) and prior acts evidence introduced to overcome a matter sought to be proved by the defense and to indicate a consciousness of guilt on the part of the defendant. However, this petition

not raise a permissible inference); and, further, that if federal habeas corpus reviewing courts are confronted with the existence of such evidence, their next step should be to determine if this "error" is harmless.

This Court has on many occasions declined to confront the question of whether the introduction of ordinary evidence in a state court trial can be intrinsically violative of due process. Two notable examples are Spencer v. Texas, 385 U.S. 554 (1966), wherein this Court makes clear that the Federal Constitution is not "infringed if a jury is told of a defendant's prior crimes."

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2. (cont.) proceeds on the basis that even if the trial court admitted character evidence to show propensity, there was committed no federal constitutional error and that the defendant was not thereby deprived of a fundamentally fair trial.

There, this Court noted that the rules of evidence concerning prior offenses are "complex, and vary from jurisdiction to jurisdiction..." Id. at p. 560. This Court stated, however, that, "To say the United States Constitution is infringed simply because this type of evidence may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects, would make inroads into this entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence." Id. at p. 562.

Spencer, supra, then noted that even in a federal prosecution, where the Government was permitted to cross-examine defense witnesses as to defendant's character and prior conviction (Michelson v. United States, 335 U.S. 469 [69 S.Ct. 213; 93 L.Ed.2d 168] (1948)), it "was not

the best forum for developing [federal] rules of evidence, and would, therefore, not proscribe the long-standing practice at issue." Id. at pp. 562-563.

Quite logically, the Spencer Court itself then reasoned, "A fortiori, this reasoning applies in the cases before us today which arise not under what has been termed the supervisory power of this Court over proceedings in the lower federal courts . . . but in the form of a constitutional claim that would require us to fashion rules of procedure and evidence in state courts. It is noteworthy that nowhere in Michelson did the Court or dissenting opinions approach the issue in constitutional terms." Id. at p. 563; emphasis in original.

The Spencer Court next discussed the issue from the standpoint of fundamental due process and rejected the notion that

the Due Process Clause of the Fourteenth Amendment required the exclusion of prior conviction evidence. The Spencer Court noted that the admission of such evidence may not be the best way to accomplish the fact finding necessary for the application of the recidivist statutes under review there, "But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority." Id. at pp. 563-564.

The second notable instance is Estelle v. McGuire, supra, wherein this Court, noting Spencer, declined to decide whether the introduction of evidence could intrinsically be said to constitute a due process violation. See Estelle, supra, 502 U.S. ___, 112 S.Ct. 475 at p. 481.

It appears, however, that now the Ninth Circuit has forced this Court's hand. Until now, the delineations between state criminal court trials, federal criminal trials and the federal writ of habeas corpus have been clear. The federal statutory, case law, and constitutional provisions control the receipt of evidence in federal court trials. The state statutory, case law, and state and federal constitutional provisions control the receipt of evidence in state court trials.

Additionally, the propriety of the receipt of evidence in state court trials has been traditionally evaluated on habeas corpus review according to a federal constitutional analysis in two manners. First, state court evidence can violate a specific constitutional guarantee of the defendant such as exclusionary rule

evidence (Mapp v. Ohio, 367 U.S. 643 (1961)); evidence in violation of the privilege against self-incrimination (Miranda v. Arizona, 384 U.S. 436 (1966)); evidence focusing on the defendant's exercise of his constitutional right to remain silent during custodial interrogation (Doyle v. Ohio, 462 U.S. 610 (1976)) or his right not to testify (Griffin v. California, 380 U.S. 609 (1965)); and certain evidence, such as hearsay, which might infringe on the defendant's right of confrontation of witnesses (Chambers v. Mississippi, 410 U.S. 284 (1973)) or might derogate, in some manner, his right to assistance of counsel (Massiah v. United States, 377 U.S. 201 (1964)). Though not exhaustive, the foregoing are examples of where the admission of evidence in a state court criminal trial might run afoul of specific

guarantees provided a defendant by the Constitution.

The second way in which the introduction of evidence might violate the federal constitution is that the evidence might rise to a level in which it denies the defendant a "fundamentally fair" trial guaranteed by the Fifth and Sixth Amendments and made applicable to the States through the Fourteenth Amendment. For example, there can be no question that a trial court could not issue an evidentiary ruling that prevented the defendant from offering <u>any</u> evidence in his own behalf. Although this action would not violate any specific constitutional guarantee, it would deny him a fair trial as a whole.

Often overlooked, as is done by the Ninth Circuit here however, is the fact that this Due Process guarantee as to the

conduct of the trial is not a common law rule-type specific provision in which the inquiry focuses on the evidence itself but is a much broader protection in which the inquiry focuses on the fairness of the trial as a whole. In other words, under Due Process, the defendant is only guaranteed that he receive a fair trial and not that any specific class of evidence will or will not be admitted against him. Only when the introduction of that evidence rises to the level of depriving him of a fair trial as a whole does the Constitutional bar assert itself.

Moreover, this Due Process bar cannot, like a statutory scheme, be confined, or even definable, by reference to a class or species of evidence such as "character evidence." Accordingly, the Due Process bar to the admission of evidence as guaranteed by the Constitution

is not part of an unstated "Federal Constitutional Evidence Code." Rather, it is a guarantee to each citizen that he will receive a fundamentally fair trial without the introduction, or exclusion for that matter, of evidence that destroys that right.

The point made above can more clearly be illuminated by reviewing the decision of the Ninth Circuit with respect to "character evidence." The decision first points out that character evidence offends not only the "California Rules of Evidence" and the "Federal Rules of Evidence," but "is contrary to firmly established principles of Anglo-American jurisprudence." See Appendix A, pp. 83-85. However, what the Ninth Circuit itself fails to note while it is so stating is that neither the "California Rules of Evidence," the "Federal Rules of

Evidence," nor the "firmly established principles of Anglo-American jurisprudence" are of federal constitutional dimension and cannot be relied on to grant relief under 28 U.S.C. § 2254. Estelle v. McGuire, supra, 112 S.Ct. 475 at p. 480 (1992).

Further, the decision proudly relies on the fact that, "The rule against using character evidence to show behavior in conformance therewith, or propensity, is one such historically grounded rule of evidence. It has persisted since at least 1684 to the present, and is now established not only in the California and federal evidence rules, but in the evidence rules of thirty-seven other states and in the common-law precedents of the remaining twelve states and the District of Columbia." See Appendix A, pp. 85-86.

Again, the enactment of all of these laws were at the instance of a legislative or judicial body making value determinations as to the conduct of the procedural aspect of trials within their own political subdivisions. As observed by the Spencer Court, in the quote above, the federal constitution does not imbue federal habeas corpus reviewing courts with such rule-making powers nor does the decision cite any authority granting them such powers.

Nor would such a grant of authority be precedented or wise. As stated above, the Due Process bar to the introduction of evidence is one which focuses on the "fundamental fairness" of the trial, with emphasis on the word "fundamental." Consistent with the latter notion, the Due Process bar to the introduction of evidence in a state court criminal trial

is not, nor can it be, applicable to evidence whose "fairness" can be the subject of reasonable debate.

For example, if a person has committed a particular crime, such as drunk driving, twenty-five times previously, some would say that his history might be probative of whether he was guilty of driving drunk on the charged occasion. However, others might, for policy reasons, want to exclude that evidence as being likely to be given undue weight by the jury. However, this is merely a policy determination and not a constitutional rule, which is why the prohibition against the use of character evidence is codified by the States enumerated in the decision and enshrined in the common law of the other States, yet it has not been enacted, or interpreted, as an independent provision of the Federal

Constitution. The simple fact is that the Ninth Circuit has now done so by judicial fiat.

The manner in which the Ninth Circuit does so is oblique and not direct. However, its central holding is clearly ascertainable by reference to fragments of rulings that appear throughout the decision. First, it states, "[In Estelle] [t]he Court did not address the questions of whether admission of irrelevant evidence could violate due process guaranteed by the Fourteenth Amendment (id.), or whether the use of character evidence to show propensity would violate due process." See Appendix A, p. 69.

Later, the Ninth Circuit unabashedly announced that, "Thus, we address the question left unanswered in Estelle: When does the use of character evidence to show propensity constitute a violation of the

Due Process Clause?" See Appendix A, p. 99.

The Ninth Circuit shortly thereafter gave its answer by stating, "The character rule is based on such a 'fundamental conception of justice' and the 'community's sense of fair play and decency' as concerned the Supreme Court in Dowling." Interestingly, next, the Ninth Circuit included the curious language that, "In this situation, McKinney's trial was impermissibly tainted by irrelevant evidence such that it is more than reasonably likely that the jury did not follow its instructions to weigh all the evidence carefully, but instead skipped careful analysis of the logical inferences raised by the circumstantial evidence and convicted McKinney on the basis of his suspicious character and previous acts, in violation of our community's standards of

fair play. ¶ The analysis that leads us to conclude that the erroneous admission of propensity evidence rendered McKinney's trial fundamentally unfair in violation of the Due Process Clause is similar to the analysis we must undertake to determine whether his conviction must be set aside on collateral review." See Appendix A, pp. 103-104.

The decision thereafter engages in a "harmless error" analysis under Brecht v. Abrahamson, ___ U.S. ___, 113 S.Ct. 1710, 1713 (1993). Appendix A, pp. 104-109. However, one might question how there can ever be a "harmless fundamentally unfair trial" in much the manner petitioner has been questioning how the Ninth Circuit could deem this to be a "closely-balanced fundamentally unfair trial."

The rule the Ninth Circuit has

applied herein is that character evidence to show propensity violates the "concepts of fair play" per se and if introduced in a case wherein the evidence is closely-balanced constitutes Due Process "error." However, as stated above, the holding must be gleaned from several pages of the opinion and is not enunciated on one page alone.

Nonetheless, the ingenious device employed by the last portion of the decision quoted above saddles the State with the commission of error based on a harmless error analysis prior to its engaging in the actual harmless error analysis. Under Brecht, the federal constitutional violation considered was the introduction of evidence of the defendant's post-Miranda silence, a violation of a specific constitutional guarantee. There was no question that

there was constitutional error. However, in initially finding constitutional error here in McKinney, the Ninth Circuit includes, as a component thereof, the fact that the case was closely-balanced.

However, as stated above, unlike the violation of a specific constitutional guarantee, the Due Process bar to the introduction of evidence in a state criminal trial is reserved for evidence that completely nullifies the defendant's right to a "fundamentally fair trial," not merely evidence that may, as all evidence of any value tends to do, tip the scales against him.

Due Process "error" with regard to the admission of ordinary evidence cannot be dependent upon the "closeness" of the case. Otherwise, federal habeas corpus reviewing courts would be given free rein to critically inspect state court criminal

trials for the introduction of evidence that the federal reviewing courts would not have, in their own conception of "fair play," allowed to have been admitted. They could then, as the Ninth Circuit has done here, simply rule that the admission of the evidence constituted a "Due Process violation" if the case were "closely-balanced." This would be wrong for the reason that the federal habeas reviewing courts would be making a "value" judgment, as the Ninth Circuit has done here, as to what evidence is or is not reliable and thus whether it should be allowed to be introduced. This is a legislative or rule-making type function, not a judicial one, and, a fortiori, not a proper judicial undertaking on collateral review.

Instead, the proper analysis is whether the introduction of the evidence nullified the defendant's right to a fair

trial. The reason that that ruling was not made here is because, quite obviously, it appears on its face that evidence of the defendant's propensity to involve himself with the type of weapon that committed the crime, while not conclusive of his guilt, certainly cannot be said to have nullified his right to a fair trial. Notwithstanding a federal habeas reviewing court's subjective opinion as to the reliability of the evidence admitted, the defendant cannot be said to have been deprived of a fair trial as long as the evidence in question bears rationally on his guilt. As argued above and demonstrated below, with respect to the question of sufficiency of the evidence, the question of reliability is not one for a federal court on collateral review.

Another reason why the Ninth Circuit employed this curious route to finding

"Due Process error" lies in the rule regarding the sufficiency of the evidence and an understanding of why the Ninth Circuit could not employ an insufficiency of evidence analysis. It must not be forgotten that another restraint on the introduction at a state court trial of evidence of dubious value remains the federal constitutional guarantee of conviction only upon sufficient evidence. Jackson v. Virginia, 443 U.S. 307 (1979).

It must be remembered that the central holding of Jackson, supra, was derived from In re Winship, 397 U.S. 358 (1970). In Jackson, supra, it was stated that "Under the Winship decision, it is clear that a state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable

doubt has stated a federal constitutional claim. Thus . . . it follows that such a claim is cognizable in a federal habeas corpus proceeding." Jackson, supra, 443 U.S. at pp. 320-321; emphasis added.

Thus, if a state prisoner can show, on federal habeas corpus review, that his conviction lacks the substance to convince a rational trier of fact of his guilt beyond a reasonable doubt, he can receive redress of his conviction. It follows also that if either the defendant was convicted on character evidence alone, or, if excluding the character evidence, the conviction would not be substantial enough to allow a reasonable trier of fact to rationally conclude he was guilty, the same result would be occasioned.

Here, McKinney did not argue, on federal habeas corpus review, that the evidence was insufficient to support his

conviction. More importantly, neither did the Ninth Circuit interpret his claim, as to the introduction of the evidence, as an attack on the sufficiency of the evidence and afford him relief on that ground. The reason why is the same for both. It is simply because even excluding consideration of the evidence involving the knives, a rational jury could have convicted petitioner beyond a reasonable doubt based on the fact that his pants and his ski gloves were found soaked in his mother's blood, based on evidence of his mother's opposition, on the night of the murder, to his father's lending him money to continue his college education, and based on other evidence noted in the state appellate court opinion. See Appendix I.

The foregoing is important to the question of the Ninth Circuit's unwarranted extension of the Due Process

bar to the introduction of evidence in state court trials for two reasons. First, it simply shows that the Ninth Circuit had to create a "rule" allowing itself to grant the writ based on the admission of evidence, which, clearly, in the context of the trial itself, could not be said to have deprived the defendant of a fair trial in view of the fact that the remaining evidence was sufficient to convict him in any event.

Second, an understanding of the sufficiency of the evidence in this case under the Jackson standard highlights the question of whether this "due process" bar to the admission of evidence is a specific constitutional guarantee as to particular evidence or whether it focuses on the trial as a whole. The rule that ordinary evidence must, as a whole, be substantial enough to support a conviction by a

rational jury beyond a reasonable doubt alleviates the necessity for a rule constitutionally outlawing any particular class of evidence. In other words, if the evidence was such that it cannot be said that its exclusion would have worked a different result, where lies the offense to Due Process and why ought the federal constitution be concerned with it?

For the reasons stated above, respondent submits that a federal habeas corpus reviewing court, when considering the introduction of ordinary evidence at a state court criminal trial, cannot, as was done here, find "error" in the admission of the evidence based solely on the type of evidence considered or the effect of that evidence on the trial or even a combination of both. The court must make the judgment that the introduction of the evidence rendered the

trial as a whole "fundamentally unfair."

However, as can be easily seen by the various references to it in the decision, the concept of "fundamental fairness," as it relates to the standard for inquiry as to the existence of constitutional error, was paid at least perfunctory deference by the decision here. However, that phrase was easily subverted and reduced to a mere mantra chanted by the Ninth Circuit as a prerequisite to its reversing a murder conviction solely because it disagreed with the wisdom of admitting the evidence actually introduced at trial.

In this case, the state appellate court viewed all of the disputed evidence as an attempt by the prosecution to overcome the defense's assertion that respondent had simply given away his knives and had not replaced the one

confiscated by the police. See Appendix I. Obviously, if respondent was lying about not having his knife collection on the night of the murder, such lying pointed to his guilt and concealment of the murder weapon or weapons. The Ninth Circuit, however, viewed the same evidence as merely the prosecution's attempt to convict respondent based on his association with dangerous weapons such as knives.

However, no matter how the prosecution evidence is viewed, the decision, distilled, means simply that the Ninth Circuit has ruled the introduction of "knife evidence" as "fundamentally unfair" in a "knife killing" case where the murder "knife" was never recovered. This is stunning to all but the guilty, who, as one might expect, have always considered the introduction of evidence

bearing on their guilt to be "unfair."

Thus, the Ninth Circuit's definition of "fundamental fairness," as applied in this case, is inextricably tied to its own outlook on the "reliability" of the evidence. However, as stated above, it is not within the province of a collateral reviewing court to consider the "reliability" and thus the "admissibility" of the evidence. As such, the Ninth Circuit's definition of "fairness" is erroneous.

The question is, instead, whether the evidence is at all probative of the question of guilt or innocence. Obviously, a defendant's past association with the type of weapon that committed the offense is probative, whether or not reliable. If the evidence is probative, it follows it cannot be said to be fundamentally "unfair" and the question of

"reliability" must be left to bodies with "rule-making" authority, of which courts on collateral review have none.

However, even if evidence is not probative, it cannot be said, based on that fact alone, that a trial containing such evidence is "fundamentally unfair." The evidence could be innocuous. Moreover, petitioner's view, unlike that of the Ninth Circuit which in this decision fashions a rule that unreliable evidence that affects the verdict is "fundamentally unfair," is that the evidence must also vitiate the defendant's right to a fair trial.

This destruction of the right to a fair trial, however, cannot be ascertained merely by noting whether the evidence affected the verdict. Since 28 U.S.C. § 2254 did not create federal habeas corpus review to enact policy, particularly in

regards to the proper admissibility of evidence in reviewing state court criminal convictions, then the only pertinent question is not the effect of the evidence on the verdict but whether the introduction of the evidence has destroyed the defendant's right to a fair trial.

In this connection, "fundamental unfairness" would appear to mean that the evidence is of the type that is inconsistent with the defendant's right to a fair trial. Some courts have defined "fundamental unfairness" as being "inconsistent with the rudimentary demands of fair procedure." See Hill v. United States, 368 U.S. 424, 428 (1962); emphasis added.

In this sense of the word, rudimentary means basic or elementary. This difference must be given more than passing consideration because it explains,

in large part, the misconception of the Ninth Circuit here, and provides a focus into the reason that the "fundamental fairness" test must be refined by this Court.

Concentrating on the phrase "fairness" and equating it with "fundamental fairness" in toto, the Ninth Circuit simply reached the value judgment that the fact that respondent had been associated with knives in the past was no reliable indicator of whether he possessed a weapon on the night of the murder and/or whether he killed his mother and thus the introduction of that evidence was "unfair." Restrained only by such a loose definition of "fundamental fairness," a reviewing collateral court is free to indulge its own sense of what is "fair" in deciding whether error has been committed and will necessarily engage collateral

reviewing courts in the business of legislating "rules" of admission for state court criminal trials.

However, as stated above, the issue is not "fairness" but "basic fair play." A clarifying distinction between the two can best be made by example. Posit a complex business fraud prosecution wherein the State introduces evidence that the defendant on trial committed several acts of molestation against children in his neighborhood. As stated above, with the knife evidence, some may question the amount of its probative value on the question of guilt and debate as to the wisdom of its allowance. However, with respect to the molestation, it can easily be observed that not only does the evidence lack a logical relation to guilt or innocence of the fraud charge, but the introduction of the evidence, because of

the fact that it tends to engender a desire to punish the defendant for conduct of which he is not being charged, universally offends a "basic" sense of fair play.

On the other hand, the knife evidence, at worst, can only be said to tend to engender a suspicion as to guilt. However, the inquiry into guilt or innocence is the whole (and legitimate) purpose of the trial. As stated above, how that guilt or innocence is shown is the primary responsibility of the State, with the federal constitution intruding only to assure that the evidence is sufficient to allow conviction beyond a reasonable doubt by a rational jury. If the conviction does not meet that test, no reference is needed to the admissibility of the evidence.

Additionally, when "fundamental

unfairness" is instead viewed as, in part, referring solely to evidence likely to produce a conviction for reasons other than the guilt or innocence of the defendant on trial, it more closely aligns with the notion of "structural trial error" as opposed to "evidentiary error." This is proper because the federal constitution, which federal courts on collateral review utilize as a guideline, contains no "evidence code" or any legislative or "rule-making" authority.

Accordingly, respondent submits that a lack of "fundamental fairness" can only be occasioned by the introduction of evidence at a state criminal court trial where the evidence 1) has no logical relationship to the question of guilt or innocence and 2) creates a strong tendency to convict the defendant for reasons other than his guilt or innocence of the charges

upon which he was tried, and, 3) nullifies the defendant's right to a fair trial as shown by the fact that in the absence of the introduction of the evidence, no rational jury would have convicted him.

Lastly, passing mention should be made of "harmless error." Since it appears clear that logically there can be no "harmless fundamentally unfair trial," recognition of this fact again validates petitioner's conclusion that the "Due Process" guarantee of a "fundamentally fair trial" is "structural" and not a specific constitutional guarantee. Accordingly, it should be reserved for the gravest of violations equal, in import, to such violations as the denial of counsel or the casting of dice by the jury to determine the verdict.

Since, as stated above, the "fundamental fairness" doctrine has

devolved to a point where, as the Ninth Circuit has done here, a collateral reviewing court can rule debatable, and even probative, evidence as constitutionally barred, respondent prays this Court grant certiorari to refine this concept in order to protect the rights of the States to be the final arbiters of admissibility of ordinary evidence in their own trials.

II.

THE DECISION VIOLATES TEAGUE V. LANE

As stated above, the decision obliquely, though assuredly, creates a new rule that character evidence to show propensity that is reasonably likely to have been the basis of the conviction constitutes a violation of the Due Process Clause which must then be subjected to a harmless error analysis. Above respondent

has pointed to the fragments of the Ninth Circuit's decision which clearly shows the rule.

In addition, even a headnote to the decision clearly states, "[7] Because drawing propensity inferences from evidence of character was impermissible, the contested evidence here could have violated due process, since there were *no* permissible inferences which the jury could have drawn from it." See Appendix A, p. 70; underlining added, italics and bold in original.

In Teague v. Lane, supra, 489 U.S. 288, 109 S.Ct. 1060, 104 L.Ed.2d 206 (1989), this Court held that a new rule enunciated after the finality of a state criminal conviction cannot be applied for the first time on collateral review absent the existence of two narrow exceptions, i.e., rules which place certain conduct

beyond the power of the State to proscribe and rules which reflect procedures "implicit in the concept of ordered liberty." Id., at p. 311.

Here, by the stealthy nature of the Ninth Circuit's decision, it can be seen that the authors would not agree that the decision establishes a new rule at all. The decision attempts to cast its treatment of character evidence as being ensconced in law dating back to the Seventeenth Century. See Appendix A, p. 85. It also utilizes the concept of "fundamental fairness" which traditionally has been the test of whether the admission of evidence violates due process. See Appendix A, p. 83. Nonetheless, as argued above, the decision uses, or misuses, those traditional concepts in such a way as to fashion a new rule.

Obviously, the decision has not

sought to justify the application of the new rule it has enunciated on the basis of one of the two narrow exceptions since it does not acknowledge that it is creating a new rule. Nor does it appear that the decision could rely on either exception. The rule does not place certain conduct beyond the power of the State to proscribe and, given the discussion above, it can hardly be said that the introduction of the knife evidence shakes the foundations of any "concept of ordered liberty." As such, the decision violates the Teague doctrine and even if its analysis were correct and sound, which it is not, the judgment reached by the decision cannot stand and must be reversed.

III.

THE DECISION VIOLATES
ESTELLE V. MCGUIRE
AND SUMNER V. MATA

In Estelle v. McGuire, supra, this

Court reversed a decision of the Ninth Circuit because the Ninth Circuit, although it recognized the probative value of the evidence, had erroneously ruled the evidence not to be at issue. As if determined not to make that error again, here the Ninth Circuit has simply refused to recognize the probative value of the evidence.

Part of respondent's defense was that, in September, some four months prior to the murder and shortly after the police had confiscated his Gerber dagger, one of his favorite knives, respondent made a gift of his Tekna knife to Carlos Potamianos. The state appellate court found that permissible inferences refuting that claim could be derived from all of the evidence which the Ninth Circuit holds here was admitted in violation of the federal constitution and which respondent

urged should have been excluded.

The state appellate court found that introduction of evidence that respondent carved "Death is His" into his dormitory door as testified to by Christopher Roderick, respondent's dormmate, was permissible to impeach the testimony of Carlos Potamianos, respondent's friend, that he had been given the Tekna knife by respondent in September. See Appendix I, p. 200. With respect to the admission of the phrase itself, the state appellate court found the permissible inference that, "Quite arguably, the peculiar nature of the phrase caused the date and location of [respondent's] scratching on the closet door to be etched in Roderick's mind, thus proving that [respondent] was in possession of the probable murder weapon after Thanksgiving of 1983." See Appendix I, p. 201.

The decision of the Ninth Circuit here also criticizes, and even quotes in its text, questioning of respondent by the prosecutor as to whether respondent was fascinated with knives. See Appendix A, pp. 106-108. The Ninth Circuit decision chiefly relies on this evidence to prove its premise that the prosecutor was merely attempting to inflame the jury against respondent. However, the state appellate court found that the evidence concerning respondent's love for and association with knives was relevant to refute the testimony that he had lost interest in them after the confiscation of his Gerber dagger in September of 1983 before the murder of the victim the following January and that he had given his Tekna knife to Potamianos shortly after the Gerber dagger confiscation. See Appendix I, pp. 201-202.

The decision of the Ninth Circuit also found no permissible inference to be derived from the admission of evidence that respondent wore camouflaged pants with a knife strapped thereto on several occasions. However, the state appellate court found that appellant's habit of wearing the camouflaged pants with the Tekna knife "connected the wearer of those pants with the murder. Thus, the connection of [respondent's] previous possession of the Tekna knife with the camouflage pants was highly relevant." See Appendix I, p. 201.

Nonetheless, the Ninth Circuit decision here simply ignored those inferences drawn by the state appellate court. As to the bulk of the evidence, the Ninth Circuit simply issued an edict that it was "probative only of character and, thus, irrelevant . . .." See

Appendix A, p. 98. The Ninth Circuit zeroed in on the carving of the phrase "Death is His" only to suggest that it was "not logical" to infer that such a "peculiar and disturbing thing" written on the wall, would have lent credibility to Roderick's remembrance of the date. See Appendix A, p. 95.

In Estelle v. McGuire, supra, the Ninth Circuit had erroneously ruled that the permissible inference was present but not at issue. Here, the Ninth Circuit simply refuses to recognize the permissible inferences. Respondent submits, however, that the ruling of Estelle is broad enough that the decision herein conflicts with it and cannot be evaded by simply ignoring the inferences to be drawn or by simply decreeing that they do not exist.

Lastly, as shown above, the decision

does not defer to findings, and indeed does not even acknowledge the inferences made by the state appellate court. Under Sumner v. Mata, supra, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), a federal habeas reviewing court is bound to respect state appellate findings of fact under 28 U.S.C. § 2254 as if those findings were made by a state court jury. The decision recognizes this principle (Appendix A at p. 91) but argues that the determination of "relevance" is one of law. Respondent has no quarrel there. However, the existence of an "inference" is a factual determination derived from direct evidence. The rule in Sumner v. Mata applies to not only facts but also inferences drawn from those facts. See Matusiak v. Kelly, 786 F.2d 536, 543 (2nd Cir. 1986); Jarrett v. Headley, 805 F.2d 34, 42 (2nd Cir. 1986). As such,

respondent submits that the Ninth Circuit was bound by the state appellate court's judgment as to whether those inferences could be drawn, absent an analysis by the Ninth Circuit showing that those inferences were not "fairly supported" by the record. No such analysis was conducted in the decision and, in fact, the decision fails to make any mention of the fact that the state appellate court found that permissible inferences could be drawn indicating that the evidence was introduced to bear on matters at issue.

Respondent has found no other case precisely on point indicating that a federal habeas corpus reviewing court is bound to accept the judgment of a state appellate court as to the permissible inferences to be drawn from the introduction of evidence if fairly supported by the record. As such,

respondent prays that this Court grant certiorari to settle this question.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Petition for Writ of Certiorari should be granted.

DATED: October 12, 1993

Respectfully Submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL SHERIDAN McKINNEY,	)	
	)	No. 89-55869
Petitioner-Appellee,	)	
	)	D.C. No.
v.	)	CV 87-5448-RJK(S)
	)	
ROBERT M. REES, SUPERINTENDENT OF DEUEL VOCATION INSTITUTION, and ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, JOHN K. VAN DE KAMP,	)	ORDER AND AMENDED OPINION
Respondents-Appellants.	)	

On Remand from the United States Supreme Court

Filed April 28, 1993
Amended June 10, 1993

Before: James R. Browning and Harry Pregerson, Circuit Judges, and William H. Orrick,*/ Senior District Judge.

Opinion by District Judge Orrick

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*. Honorable William H. Orrick, Senior United States District Judge for the Northern District of California, sitting by designation.

SUMMARY

Criminal Law and Procedure/Evidence

The court of appeals affirmed an order of the district court. The court held that admitted evidence which centered around a defendant's prior possession of a knife of a type which could have inflicted the fatal wounds, but which was not relevant to any essential element of the murder with which he was charged, functioned as evidence of other acts from which the jury could impermissibly infer that the defendant had propensity to commit the crime charged.

Appellee Michael McKinney's mother died in January 1984, after her throat was cut. The evidence showed that her wounds could have been made by many types of knives, including the ordinary kitchen knives found in the house in which she died, and a Buck knife in the possession of McKinney's father. The murder weapon was not identified. There was evidence that McKinney had

possessed a "Gerber" knife which was confiscated by police in September 1983, and that he had owned a "Tekna" knife in the autumn of 1983. Both could have inflicted the wounds which killed McKinney's mother. There was also evidence that Mckinney had used a knife to scratch the words "Death is His" on the closet door of his college dormitory room, and that on two occasions he had worn camouflaged pants with a knife strapped to his body. Camouflaged pants belonging to McKinney and stained with his mother's blood were found in the room in his parents' house in which McKinney had been sleeping.

McKinney was convicted of his mother's murder. He petitioned for habeas corpus relief in the district court, which granted a conditional writ. Appellant Robert Rees, superintendent of the California prison in which McKinney was incarcerated, appealed the order. The court of appeals affirmed. The Supreme Court granted certiorari, and remanded the case for further consideration in light of Estelle v. McGuire, 112

S.Ct. 475 (1991).

[1] In Estelle the Supreme Court found that certain evidence, which the Ninth Circuit had held to be irrelevant, was relevant and probative of the essential element of intent. In Estelle the Court did not address the questions of whether admission of irrelevant evidence could violate due process, or whether the use of character evidence to show propensity would violate due process. [2] The examination of the contested evidence in this case involved analysis of whether, as in Estelle, it was relevant to an essential element of the crime, and, if not, whether its admission rendered McKinney's trial fundamentally unfair.

[3] The evidence regarding the "Gerber" knife was irrelevant to any element of the case. The only inference to be drawn from the evidence was that McKinney was the sort of person who would own a knife. Thus, it was evidence of another act offered to prove character, giving rise to a propensity inference. [4] The only inference which

could be drawn from the evidence concerning the wearing of camouflaged pants with a knife was that McKinney was wearing them on the night of the murder. That inference was an impermissible propensity inference based on other acts offered to prove character. [5] The evidence of the carved words was evidence of other acts offered as character evidence, and was not probative of any element of the crime charged. No rational inferences from it were permissible under the rule against character evidence. [6] Because evidence that McKinney had a "Tekna" knife in his possession in the autumn of 1983 made his identity as the murdered, a fact of consequence, more probable, its admission was not in violation of the rule against evidence of other acts to prove character.

[7] Because drawing propensity inferences from evidence of character was impermissible, the contested evidence here could have violated due process, since there were no permissible inferences which the jury could have drawn from it. [8]

Character evidence to show propensity does not violate a fundamental conception of justice and the community's sense of fair play because it is irrelevant. On the contrary, it is said to weigh too much with the jury and is said to overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. [9] The evidence in this case was emotionally charged. It served only to prey on the emotions of the jury, to lead them to mistrust McKinney, and to believe more easily that he was the type of man who would kill his mother in her sleep. [10] Because of the lack of a weighty case against McKinney, and the pervasiveness of the erroneously admitted evidence throughout the trial, it was highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict.

COUNSEL

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Joseph A. Burns, District Attorney's Office, San Bernardino, California, for the amicus.

ORDER

The opinion filed April 28, 1993, is amended as follows: on slip opinion page 4231, delete the last paragraph and insert the following text:

The analysis that leads us to conclude that the erroneous admission of propensity evidence rendered McKinney's trial fundamentally unfair in violation of the Due Process Clause is similar to the analysis we must undertake to determine whether his

conviction must be set aside on collateral review. The Supreme Court recently held that a federal court, reviewing whether the state prosecution's use of the defendant's post-Miranda silence necessitates habeas corpus relief, must determine whether the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht v. Abrahamson, 113 S.Ct. 1710, 1713 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). Like the rule against the use of character evidence, the rule against the use of post-Miranda silence for impeachment purposes, articulated in Doyle v. Ohio, 426 U.S. 610 (1976), is "rooted in fundamental fairness and due process concerns." Brecht, 113 S.Ct. 1717. And like Doyle error, the kind of error that occurred in this case is "trial error" that necessitates habeas relief when it results in grievous wrong to a defendant at the hands of the state. Id. at 1717-18.

This case, however, does not present the same factual situation as Brecht, in which erroneous

references to post-Miranda silence were "in effect, cumulative" of admissible evidence of pre-Miranda silence and there was "weighty" evidence of defendant's guilt. Id. at 1722. Like Justice Stevens, we review the trial transcript to determine not whether the jurors were right in their judgment, regardless of the error or its effect upon the verdict. [But] rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record. Kotteakos, 328 U.S. at 764 (citations

omitted) (quoted in Brecht, 113 S.Ct. at 1724 (Stevens, J., concurring). As discussed above, a review of the record leads us inexorably to the conclusion that the erroneously admitted character evidence was not only irrelevant, but just the sort of evidence likely to have a strong impact on the minds of the jurors. The knife evidence was not only irrelevant, but just the sort of evidence likely to have a strong impact on the minds of the jurors. The knife evidence was not cumulative or insignificant. We counted over sixty pages of testimony in the record regarding McKinney's knife ownership, and camouflage pants.10/ Nor was the

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10. One witness, Officer Brent Smith, was called solely to testify about the confiscation of McKinney's knife in September. Prosecution witnesses Potamianos, Roderick, Pamela Kouba, Jane Kelsey, and Detective Freeze were asked about knives and camouflage clothing, and Michael mcKinney testified both on direct, and more extensively, on cross-examination about the knives. One exchange with the prosecutor was as follows:

> Q: Well, you have a certain fascination with knives, don't you, Michael?

evidence against McKinney "weighty," as discussed above. This is not a case, like Brecht, in which the defendant confessed to the killing. The jury

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A: What do you mean by fascination?

Q: Don't you like knives? Don't you like owning knives?

A: Yes

Q: If you are walking by a store, for example, that had a collection of various daggers and knives, don't you like stopping and looking at them and examining them?

A: Yes

. . . .

Q: And in fact, knives were your hobby, weren't they? One of your hobbies?

A: No.

Q: You enjoyed collecting them. You enjoyed talking about them, talking about the different type of knives that you had, didn't you?

A: Yes, I talked about the different type of knives I had.

The prosecution summarized all this testimony in its closing argument, and twice reiterated that McKinney's knife ownership was one of two or three crucial issues in the case.

was faced with the choice between Michael McKinney and Quentin McKinney, two men who were present on the scene and two men who each had owned knives that could have been used to commit the murder. Circumstantial evidence implicated each of them.

Because of the lack of a "weighty" case against McKinney, and pervasiveness of the erroneously admitted evidence throughout the trial, we think it "highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict." Kotteakos, 328 u.S. at 776. His was not the trial by peers promised by the Constitution of the United States, conducted in accordance with centuries-old fundamental conceptions of justice. It is part of our community's sense of fair play that people are convicted because of what they have done, not who they are. Because his trial was so infused with irrelevant prejudicial evidence as to be fundamentally unfair, McKinney is entitled to the conditional writ of habeas corpus that the district

court awarded him.[11]

AFFIRMED.

OPINION

ORRICK, District Judge:

Respondents-Appellants, Robert M. Rees, Superintendent of Deuel Vocation Institution, and John K. Van de Kamp, then Attorney General of the State of California ("State"), appealed the conditional grant of a writ of habeas corpus to Michael Sheridan McKinney entered by the United States District Court for the Central District of

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11. The court notes that its analysis is consistent with its reasoning in Henry v. Estelle, No. 91-55691 (9th Cir. May 18, 1993), in which it also found that the erroneous admission of irrelevant prior acts evidence was distinct from the situation in Estelle, 112 S.Ct. 475, and a violation of due process that necessitated the grant of habeas under Brecht.

California. We affirmed in our Memorandum filed September 5, 1990. The Supreme Court of the United States granted certiorari, vacated our opinion, and remanded the case for further consideration in light of Estelle v. McGuire, 112 S.Ct. 475 (1991), which reversed the decision of this court. McGuire v. Estelle, 902 F.2d 749 (9th Cir. 1990). After considering supplemental briefing and the Estelle opinion, we again affirm, finding Estelle inapposite to the case at bench.

I.

[1] In Estelle, the Supreme Court overturned our holding that the erroneous admission of evidence, coupled with a prejudicial instruction, rendered McGuire's trial fundamentally unfair. McGuire was prosecuted for the murder of his infant daughter. The disputed evidence was evidence that the child suffered prior serious injuries, characteristic of the "battered child syndrome." The trial court admitted the evidence as proof that the injuries from which she died were inflicted intentionally,

rather than accidentally. We found that the lack of connection between the prior injuries and the defendant rendered the evidence irrelevant, but the Supreme Court reversed, finding that the "battered child syndrome" evidence was relevant and probative of the essential element of intent. Estelle, 112 S.Ct. at 480. The defendant's decision not to contest that element did not lift the burden from the prosecution to prove it. Id. at 480-81. The Supreme Court found that even if the jury instructions were somewhat ambiguous, there was not a reasonable likelihood that the jury would have used the prior injury evidence impermissibly as propensity evidence. Therefore, it concluded, there was no violation of McGuire's due process rights. Id. at 483-84. The Court did not address the questions of whether the admission of irrelevant evidence could violate the due process guaranteed by the Fourteenth Amendment (id.), or whether the use of character evidence to show propensity would violate the Due Process Clause.

Id. at 484 n.5.

II

As we now reconsider this case in light of Estelle, we are mindful that "[i]n conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Id. at 480. McKinney claims, as he did in the Court of Appeal of the State of California, that his constitutional right to a fundamentally fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment was violated. See Gideon v. Wainwright, 372 U.S. 335, 342 (1963). It is this claim that this court must evaluate. This court also is mindful of the reiteration by the Estelle Court that "`the category of infractions that violate "fundamental fairness"'" is a very narrow one. 112 S.Ct. at 482 (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)).

[2] We now examine the contested evidence to determine, first, whether like the contested

evidence in Estelle, it was relevant to an essential element in the prosecution's case, and second, if not whether its admission rendered McKinney's trial fundamentally unfair.[1]

A.

Evidence is considered irrelevant if it fails to make any fact of consequence more or less probable. See Fed. R. Evid. 401. Irrelevant evidence may merely be a waste of time, may confuse the jury, or may cause serious prejudice to the defense. The argument regarding relevance in this case is different from that in Estelle. In Estelle, the Supreme Court found that the "battered child syndrome" evidence was relevant to the intentional nature of the injuries that killed the child, a fact of consequence. 112 S.Ct. at 480. The

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1. Although a federal court is bound to give deference to factual determinations of all state courts (Sumner v. Mata, 449 U.S. 539, 547 (1981) (interpreting 28 U.S.C. § 2254(d))), we review the decision of the district court to grant a conditional writ de novo. Weygandt v. Ducharme, 774 F.2d 1491, 1492 (9th Cir. 1985).

contested evidence in his case can loosely be termed 'other acts' evidence. 'Other acts' evidence may be relevant to a fact of consequence, or it may be relevant only insofar as it proves the character of the defendant in order to show action in conformity therewith, in which case it is a form of character evidence.

Preliminarily, it is helpful to discuss the use of character evidence. The use of 'other acts' evidence as character evidence is not only impermissible under the theory of evidence codified in the California rules of Evidence (Cal. Evid. Code § 1101 (West Supp. 1993) and the Federal Rules of Evidence (Fed. R. Evid. Cod 404(b)), but is contrary to firmly established principles of Anglo-American jurisprudence. In 1684, Justice Withins recalled a prior case in which the court excluded evidence of any forgeries, except the one for which the defendant was standing trial. Hampden's Trial, How. St. Tr. 1053, 1103 (K.B. 1684). Similarly, in Harrison's Trial, the Lord Chief Justice excluded

evidence of a prior wrongful act of a defendant who was on trial for murder, saying to the prosecution: 'Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter.' 12 How. St. Tr. 834 (Old Bailey 1692). Early American courts retained the rule against using 'other acts' evidence as character evidence to show action in conformity therewith. See e.g., Rex v. Doaks, Quincy's Mass. Reports 90 (Mass. Super. Ct. 1763) (excluding evidence of former acts of lasciviousness from the trial of a defendant accused of keeping a bawdy house); Boyd v. United States, 142 U.S. 450, 458 (1892) (finding that admission of prior crimes committed by defendants so prejudiced their trial as to require reversal). As acknowledged by the Supreme Court in Brinegar v. United States, 338 U.S. 160, 174 (1949):

> Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law

> tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

The rule against using character evidence to show behavior in conformance therewith, or propensity, is one such historically grounded rule of evidence. It has persisted since at least 1684 to the present, and is now established not only in the California and federal evidence rules, but in the evidence rules of thirty-seven other states and in the common-law precedents of the remaining twelve states and the District of Columbia.[2/]

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2. The rule forbidding the admission of evidence of character to show propensity has been codified in thirty-seven states other than California. See Alaska Evid. Code § 404; Ariz. R. Evid. 404; Ark. R. Evid. 404; Colo. R. Evid. 404; Del R. Evid. 404; Fla. Stat. ch. 90.404; Haw. R. Evid. 404; Idaho R. Evid. 404; Iowa R. Evid. 404; Kan Stat. Ann. § 60-447; Ky. R. Evid.

The question brought to us by McKinney and

404; La. Code Evid. Ann. art. 404; Me. R. Evid. 404; Mich. R. Evid. 404; Minn. R. Evid. 404; Miss. R. Evid. 404; Mont. R. Evid. 404; Neb. Rev. Stat. § 27-404 (Reissue 1989); Nev. Rev. Stat. § 48.045 (1986); N.H. R. Evid. 404; N.J.R. Evid. 47; N.M. Stat. Ann. § 11-404 (Michie 1986); N.C. Gen. Stat. § 8c-1, Rule 404 (1988 & Cumm. Supp. 1990); N.D.R. Evid. 404; Ohio R. Evid. 404; Okla Stat. tit. 12, § 2404 (1991); Or. R. Evid. 404; R.I.R. Evid. 404; S.D. Codified Laws Ann. § 19-12-5(1992); Tenn. R. Evid. 404; Tex. R. Crim. Evid. 404; Utah R. Evid. 404; Vt. R. Evid. 404; Wash. R. Evid. 404; W. Va. R. Evid. 404; Wis. R. Evid. 904.03; Wyo. R. Evid. 404.

Twelve other states and the District of Columbia have adopted the rule against the admission of character evidence to show propensity through case law. See Artis v. United States, 505 A.2d 52, 56 (D.C. App. 1986, cert. denied, 479 U.S. 964 (1986); Anonymous v. State, 507 So. 2d 972, 973-74 (Ala. 1987); State v. Holliday, 159 Conn. 169, 268 A.2d 368, 369 (1970); Brown v. State, 197 Ga.App.155, 398 S.E.2d 34, 34 (1990); People v. Kannapes, 208 Ill.App.3d 400, 567 N.E.2d 377, 379-80 (1990); Penley v. State, 506 N.E.2d 806, 808 (Ind. 1987); Ross v. State, 276 Md. 664, 350 A.2d 680, 684 (1976); Commonwealth v. Chalifoux, 362 Mass. 811, 291 N.E.2d 635, 638 (1973) State v. Clark, 801 S.W.2d 701, 703 (Mo. 1990); People v. Powell, 152 A.D.2d 918, 543 N.Y.S.2d 818, 819 (1989); Commonwealth v. Lark, 518 Pa. 290, 543 A.2d 491, 497 (1988); State v. Griffin, 277 S.C. 193, 285 S.E.2d 631, 633-34 (1981); Brooks v. Commonwealth, 220 Va. 405, 258 S.Ed.2d 504, 506 (1979).

returned to us by the Supreme Court is whether the admitted evidence of "other acts" of the defendant was relevant to a fact of consequence, or was only evidence of character offered to show propensity. Under the historic rule against character evidence, summarize the contested evidence and then subject it to close scrutiny to determine whether any inferences relevant to a fact of consequence may be drawn from each piece of the evidence, or whether they lead only to impermissible inferences about the defendant's character.[3]

1.

The "other acts" evidence in this case centers around knives. The victim, McKinney's mother Betty McKinney, died on January 28, 1984, after her throat was slit. The medical examiner testified that the cuts could have been made by almost any

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3. We note, of course, that there are exceptions to the rule against character evidence. For example, Rule 404(a) of the Federal Rules of Evidence permits the use of character evidence by an accused.

kind of knife, including ordinary kitchen knives found in the house, and a Buck knife, that McKinney's father, Quentin McKinney, was wearing on his belt when the police arrived at the scene. None of the knives at the scene bore any sign of blood, and the murder weapon was never identified.

The court admitted evidence that Michael McKinney had possessed a "Gerber" knife that was confiscated by the police officer in September 1983 and never returned, and that he had also owned a "Tekna" knife in the fall of 1983. Both knives were double-edge, dagger-type knives. Like the knives found at the scene, these knives could have inflicted the type of wounds suffered by Mrs. McKinney. There was conflicting evidence regarding when the Tekna knife was in McKinney's possession. mcKinney and a friend of his, Constantine Potamianos, testified at trial that McKinney gave Potamianos the Tekna knife before Thanksgiving. Several months after the murder, Potamianos gave the police a Tekna knife he claimed was the one

McKinney had given him. McKinney's college roommate, Christopher Roderick, testified that he saw McKinney with a Tekna-type knife sometime between Thanksgiving and December 9, 1983, contradicting his earlier statement to police that it was late October when he saw McKinney with the knife.

There was also testimony that McKinney was proud of his "knife collection," that on occasion he strapped a knife to his body while wearing camouflage pants, and that he used a knife to scratch the words "Death is His" on the door to his closet in his dormitory room. The prosecutor questioned McKinney about his "fascination" with knives, and about whether he enjoyed looking at, talking about, and possessing knives. In his closing argument, the prosecutor described his case as concentrating on three things, one of which was "any knives the defendant may have owned." He reiterated that the connection McKinney had to any knives that could have been used in this crime was

important.

2.

We now consider whether any pieces of the contested knife evidence were evidence from which inferences relevant to any fact of consequence may have been drawn.

To prove that McKinney was guilty of murder, the prosecution had to prove the following elements: (1) that McKinney killed a human being; (2) that the killing was unlawful; and (3) that the killing was done with malice aforethought. Cal. Penal Code § 187; CALJIC 8.10. In addition, to prove McKinney was guilty of first-degree murder, the prosecution had to prove that the killing was "willful, deliberate and premeditated," "with express malice aforethought." CALJIC 8.20. if the knife evidence tended to make any fact relevant to these elements more or less probable, it was relevant and admissible, just as the "battered child syndrome" evidence in Estelle was admissible to prove intent.

The State argues that the knife evidence described above was admissible to dispute McKinney's claim that he was "knife-free" at the time of the murder. It argues that this evidence tends to show that he was lying and that he actually owned a Tekna knife on January 28, 1984, but lied about it out of guilty to cover up the fact hat he had hidden his knife after using it to kill his mother. The State concludes that, therefore, the evidence was probative of opportunity, making it more likely that McKinney did the killing, a conclusion the state appellate court also reached.[4/]

We analyze this argument in support of the admission of the evidence of the Gerber knife, the

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4. The State attempts to bind this court to the findings of the state appellate court by characterizing as much of the state court's opinion as findings of fact as possible. As discussed above, this court recognizes that under Sumner, and principles of comity, it is bound by factual findings of the state courts. The legal conclusions regarding the admissibility of evidence, however, are not findings of fact, and are not binding on this court.

wearing of camouflage and a knife, the "Death is His" carving, and the Tekna knife seriatim.

[3] The evidence regarding the Gerber knife that was indisputably no longer in McKinney's possession on January 28, 1984, is irrelevant to any element of the prosecution's case, including opportunity, and is irrelevant to any argument that he was "knife-free." The only inference the jury could have drawn from such evidence is that because McKinney had owned a knife in September 1983, he owned a knife in January 1984, i.e., that he was the type of person who would own a knife. The evidence thus was evidence of another act offered to prove character and giving rise to a propensity inference, and did not tend to prove a fact of consequence.

[4] Similarly, evidence that McKinney at times in the past wore a knife when wearing camouflage and that he scratched the words "Death is His" on the door to his dormitory room closet is also irrelevant to his opportunity to kill his mother,

i.e., to whether he had a Tekna-type knife in his possession at the time of the murder. The only inference to be drawn from the fact that McKinney twice in the past was seen wearing a knife with his camouflage pants was that because his camouflage pants were apparently worn by the murdered,[5/] he was wearing them with a knife the night of the murder. That inference, like the inference that because McKinney owned a knife in September, he owned one in January, is an impermissible propensity inference based on other acts offered to prove character, not evidence of opportunity. Like the evidence of the confiscated knife, that evidence gave rise to no permissible inferences making a fact of consequence more or less

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5. A pair of McKinney's camouflage pants, soaked with blood of his mother's type on the right leg, was found in the room in which he had been sleeping while staying at his parents' house that January.

probable.[6]

It is hard to imagine any inference at all to be drawn from the fact that McKinney scratched "Death is His" on his closet door, words that were not explained at trial, except that perhaps he had a fascination with death and knives and, therefore, was more likely to have committed a murder with a knife. The trial court not only permitted testimony about this other act, but admitted color photographs of the scratches in the door.

[5] The State argues that the peculiar nature of what McKinney carved was admissible to lend credence to Roderick's testimony of when he saw McKinney with a knife. It argues that the evidence permitted the jury to make the inference that because McKinney wrote such a peculiar and

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6. This analysis also applies to the miscellaneous evidence of McKinney's fascination with knives, including discussion of his collection, sharpening activities, and window shopping for knives. All the evidence was evidence of other acts offered as character evidence to show McKinney's propensity to own knives.

disturbing thing on the wall of their shared dormitory room, Roderick was more likely to remember accurately the date on which he saw McKinney using the knife. This inference, while unrelated to McKinney's character, is not logical. The nature of McKinney's activity may have made the incident stand out sharply in his roommate's mind, but does not go to Roderick's remembrance of the date. In contrast, testimony that Roderick had just returned from a Thanksgiving vacation trip, a detail related to the temporal element of the incident, would logically give rise to an inference that Roderick was able to place the scratching incident accurately in time. The evidence of the carving is, again, "other acts" evidence offered as character evidence, not probative of any element of the offense with which McKinney was charged, or even of the State's definition of "opportunity." There are no rational inferences, permissible under the historical rule against character evidence, raised by the evidence.

The evidence regarding McKinney's possession of the Tekna knife is slightly different, because there was conflicting evidence regarding the dates of his possession, as discussed above. It is not evidence of another act, but of a simple fact: whether McKinney was the owner of a knife on the date of the murder. The State argued at trial that either McKinney and Potamianos lied when they testified that McKinney gave Potamianos the knife before Thanksgiving, or that McKinney bought another knife that Roderick saw after Thanksgiving. It argues that if the jury believed Roderick's testimony that McKinney had a Tekna knife some seven weeks before the murder, it could, therefore, infer that McKinney had a Tekna knife in his possession at the time of the murder, and that if McKinney had the knife in his possession, he rather than his father, was more likely to use it to commit the crime. Further, the State argues that the jury could infer that the failure to find the knife at the scene or in McKinney's possession

indicates that it was hidden, that if was hidden because it was bloody, that it was bloody because it was the murder weapon and, therefore, because McKinney was more likely to have used the knife to commit the murder, that McKinney did commit the murder.

[6] Although this evidence may have been more prejudicial than probative and, thus, inadmissible under California evidence law, this court is only concerned with its relevance. Because the evidence that McKinney had a Tekna-like knife in his possession soon after Thanksgiving makes a fact of consequence, his identity as the murderer, more probable, its admission was not in violation of the historically grounded rule against the use of 'other acts' evidence to prove character.7/

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7. It is also faintly relevant to the issue of opportunity. It is undisputed that McKinney was in the house at the time of the murder, and that he had access to numerous knives that could have been the murder weapon. If he also had a knife in his personal possession, his opportunity to commit a murder with a knife is slightly enhanced. Because we find that the evidence was

B.

Having concluded that much of the disputed evidence was "other acts" evidence probative only of character and, thus, irrelevant, this court must decide whether the erroneously admitted evidence was "'of such quality as necessarily prevents a fair trial.'" Kealohapauole v. Shimoda, 800 F.2d 1463, 1465 (9th Cir. 1986) (quoting Lisenba v. California, 314 U.S. 219, 236 (1991)), den. denied, 479 U.S. 1068 (1987). As the Supreme Court recently reiterated in Dowling, when determining whether a due process violation has occurred, courts "are to determine only whether the action complained of . . . violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency." 493 U.S. at 353 (internal quotation marks and

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relevant to the issue of identity, which is an essential element, we do not analyze further the question of opportunity.

citations omitted).

[7] Previously we have held that "[o]nly if there are no permissible inferences the jury may draw from the evidence can its admission violate due process." Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991). Because drawing propensity inferences from "other acts" evidence of character is impermissible under an historically grounded rule of Anglo-American jurisprudence, the knife evidence meets the strict test we established in Jammal. There are no permissible inferences the jury could have drawn from the character evidence discussed above. The admission of this evidence, therefore, could have violated due process. We must now consider whether, under the facts of this case considered as a whole, the admission of irrelevant character evidence did violate due process. Thus, we address the question left unanswered in Estelle: When does the use of character evidence to show propensity constitute a violation of the Due Process Clause?

[8] The gravamen of the historic attempt to exclude such character evidence is to force the jury, as much as humanly possible, to put aside emotions and prejudices raised by phrases such as "fascination with knives" and "Death is His," and consider the body of evidence, both testimonial and physical before them, in order to decide if the prosecution has convinced them, beyond a reasonable doubt, that the defendant is guilty of the crime charged. The character rule is based on such a "fundamental conception of justice" and the "community's sense of fair play and decency as concerned the Supreme Court in Dowling. After all, as shown above,

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution of any kind of evidence of a defendant's evil character to establish the probability of his guilt. . . . The state may not show defendant's prior trouble with the law, specific criminal acts,

> or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weight too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defendant against a particular charge.

Michelson v. United States, 335 U.S. 469, 475-76 (1948) (footnotes omitted).

[9] Unlike the disputed evidence in Jammal, 926 F.2d at 920, which we described as "relatively sterile,"[8] the evidence in this case is emotionally charged. The prosecution used evidence of the Gerber knife, which could not possibly have been used to commit the murder, to help paint a

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8. The disputed evidence in Jammal was evidence that, when arrested, the defendant was driving a car with $135,000 in the trunk. 926 F.2d at 920.

picture of a young man with a fascination with knives and with a commando lifestyle. The prosecutor raised the issue on cross-examination of why McKinney had purchased a knife with a black blade, asking him whether it was because such knives are favored by commandos because they do not reflect light. The jury was offered the image of a man with a knife collection, who sat in his dormitory room sharpening knives, scratching morbid inscriptions on the wall, and occasionally venturing forth in camouflage with a knife strapped to his body. This evidence, as discussed above, was not relevant to the questions before the jury. It served only to prey on the emotions of the jury, to lead them to mistrust McKinney, and to believe more easily that he was the type of son who would kill his mother in her sleep without much apparent motive.

Further, the case against McKinney based on relevant evidence was solely circumstantial. Two men, the defendant and his father, were found at

the scene of the murder. Neither man confessed to the crime, and neither man testified that he saw the other commit the crime. The father's bloody T-shirt was in the bathtub. McKinney's bloody pants were in the den. Neither man had a clear motive.[9] Wile there was an abundance of knives in the house, no bloody knife was found. Aside from the clothing and knives, and testimony of the testimony of the police officers and neighbors who came to the scene, the chief evidence to be weighed by the jury was the testimony of McKinney and his father, giving differing accounts of the evening.

In this situation, McKinney's trial was impermissibly tainted by irrelevant evidence such that it is more than reasonably likely that the jury did not follow its instructions to weigh all

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9. Quentin testified that there had been an earlier discussion about McKinney's financial aid for the semester, and that he and his wife had privately decided to refuse him a further loan. While the prosecution argued that McKinney may have argued with his mother about the money, McKinney testified that when he went out that night, he understood that he would get the loan.

the evidence carefully, but instead skipped careful analysis of the logical inferences raised by the circumstantial evidence and convicted McKinney on the basis of his suspicious character and previous acts, in violation of our community's standards of fair play.

The analysis that leads us to conclude that the erroneous admission of propensity evidence rendered McKinney's trial fundamentally unfair in violation of the Due Process Clause is similar to the analysis we must undertake to determine whether his conviction must be set aside on collateral review. The Supreme Court recently held that a federal court, reviewing whether the state prosecution's use of the defendant's post-Miranda silence necessitates habeas corpus relief, must determine whether the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht v. Abrahamson, 113 S.Ct. 1710, 1713 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). Like the rule against the use of

character evidence, the rule against the use of post-Miranda silence for impeachment purposes, articulated in Doyle v. Ohio, 426 U.S. 610 (1976), is "rooted in fundamental fairness and due process concerns." Brecht, 113 S.Ct. 1717. And like Doyle error, the kind of error that occurred in this case is "trial error" that necessitates habeas relief when it results in grieving wrong to a defendant at the hands of the state. Id. at 1717-18.

This case, however, does not present the same factual situation as Brecht, in which erroneous references to post-Miranda silence were "in effect, cumulative" of admissible evidence of pre-Miranda silence and there was "weighty" evidence of defendant's guilt. Id. at 1722. Like Justice Stevens, we review the trial transcript to determine not whether the jurors were right in their judgment, regardless of the error or its effect upon the verdict. [But] rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is

the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record. Kotteakos, 328 U.S. at 764 (citations omitted) (quoted in Brecht, 113 S.Ct. at 1724 (Stevens, J., concurring). As discussed above, a review of the record leads us inexorably to the conclusion that the erroneously admitted character evidence was not only irrelevant, but just the sort of evidence likely to have a strong impact on the minds of the jurors. The knife evidence was not cumulative or insignificant. We count over sixty pages of testimony in the record regarding

McKinney's knife ownership, and camouflage pants.[10] Nor was the evidence against McKinney

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10. One witness, Officer Brent Smith, was called solely to testify about the confiscation of McKinney's knife in September. Prosecution witnesses Potamianos, Roderick, Pamela Kouba, Jane Kelsey, and Detective Freeze were asked about knives and camouflage clothing, and Michael mcKinney testified both on direct, and more extensively, on cross-examination about the knives. One exchange with the prosecutor was as follows:

> Q: Well, you have a certain fascination with knives, don't you, Michael?
>
> A: What do you mean by fascination?
>
> Q: Don't you like knives? Don't you like owning knives?
>
> A: Yes
>
> Q: If you are walking by a store, for example, that had a collection of various daggers and knives, don't you like stopping and looking at them and examining them?
>
> A: Yes
>
> . . . .
>
> Q: And in fact, knives were your hobby, weren't they? One of your hobbies?
>
> A: No.
>
> Q: You enjoyed collecting them. You enjoyed

'weighty,' as discussed above. This is not a case, like Brecht, in which the defendant confessed to the killing. The jury was faced with the choice between Michael McKinney and Quentin McKinney, two men who were present on the scene and two men who each had owned knives that could have been used to commit the murder. Circumstantial evidence implicated each of them.

[10] Because of the lack of a 'weighty' case against McKinney, and pervasiveness of the erroneously admitted evidence throughout the trial, we think it 'highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict.' Kotteakos, 328

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talking about them, talking about the different type of knives that you had, didn't you?

A: Yes, I talked about the different type of knives I had.

The prosecution summarized all this testimony in its closing argument, and twice reiterated that McKinney's knife ownership was one of two or three crucial issues in the case.

u.S. at 776. His was not the trial by peers promised by the Constitution of the United States, conducted in accordance with centuries-old fundamental conceptions of justice. It is part of our community's sense of fair play that people are convicted because of what they have done, not who they are. Because his trial was so infused with irrelevant prejudicial evidence as to be fundamentally unfair, McKinney is entitled to the conditional writ of habeas corpus that the district court awarded him.[11]/

AFFIRMED.

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11. The court notes that its analysis is consistent with its reasoning in Henry v. Estelle, No. 91-55691 (9th Cir. May 18, 1993), in which it also found that the erroneous admission of irrelevant prior acts evidence was distinct from the situation in Estelle, 112 S.Ct. 475, and a violation of due process that necessitated the grant of habeas under Brecht.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL SHERIDAN MCKINNEY,	) No. 89-55869
Petitioner-Appellee,	) D.C. No. CV 87-5448-RJK (S)
v.	) ORDER
ROBERT M. REES, Superintendent; JOHN K. VAN DE KAMP,	)
Respondents-Appellants.	)

Before: BROWNING, PREGERSON, and ORRICK, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. p. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 13, 1992

Mr. Robert S. Henry
Deputy Attorney General
3580 Wilshire Blvd., 6th Fl.
Los Angeles, CA 90010

Re: Al Gomez, Warden, Deuel Vocational Institution of California, Petitioner v. Michael Sheridan McKinney
No. 90-1258

Dear Mr. Henry:

The Court today entered the following order in the above entitled case:

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Estelle v. McGuire, 502 U.S. ------ (1991).

Very truly yours,

William K. Suter, Clerk

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL SHERIDAN McKINNEY,	)	No. 89-55869
	)	
Petitioner-Appellee,	)	D. C. No. CV
	)	87-5448-
	)	RJK (S)
vs.	)	
	)	MEMORANDUM*/
ROBERT M. REES,	)	
SUPERINTENDENT OF DEUEL	)	
VOCATIONAL INSTITUTION, and	)	
ATTORNEY GENERAL OF THE	)	
STATE OF CALIFORNIA,	)	
JOHN K. VAN DE KAMP,	)	
	)	
Respondents-Appellants.	)	
	)	

Appeal from the United States
District Court for the Central
District of California
Robert L. Kelleher, District Judge,
Presiding Argued and Submitted
June 4, 1990

Before: BROWNING and PREGERSON, Circuit Judges, and ORRICK,**/
Senior District Judge

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*. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

**. Honorable William H. Orrick, Senior United States District Judge for the Northern District of California, sitting by designation.

Respondents-appellants, Robert M. Rees, Superintendent of Deuel Vocational Institution, and Attorney General of the State of California, John K. Van de Kamp ("State"), appeal the conditional grant of writ of habeas corpus entered by the United States District Court for the Central District of California in which the court found that petitioner-appellee, Michael Sheridan McKinney ("McKinney"), was denied his right to a fundamentally fair trial. We affirm.

I

McKinney was convicted by a jury in the Superior Court of Los Angeles, State of California, of the first degree murder of his adoptive mother. He appealed his conviction to the Court of Appeal, which affirmed his conviction. He failed to file a timely petition for review of his conviction in the California Supreme Court because his counsel miscalculated the dates and filed the petition for review one day late. McKinney then filed a petition for writ of habeas corpus in the

California Supreme Court, alleging ineffective assistance of counsel for failure to file a timely request for review that resulted in the loss of his opportunity to have that Court consider four arguments as to why his conviction should be reversed. The four arguments were specified in the petition for a writ of habeas corpus and a copy of his petition for review was attached as an appendix. The petition for a writ of habeas corpus was summarily denied by the California Supreme Court.

McKinney then filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Central District of California. The petition was referred to a magistrate. The State filed its return to the order to show cause alleging failure to exhaust state remedies. The magistrate found that McKinney had exhausted his state remedies and issued an order requiring the State to file a supplemental return addressing the merits of the petition. The

State filed a supplemental return, the magistrate issued a preliminary report, and McKinney and the State filed timely objections. The State's objections were directed to the merits of the petition and did not address the exhaustion issue. After consideration of the objections, the magistrate issued a final report and recommendation ("report"). The district court filed an order adopting the report and entered a judgment that conditionally granted the writ of habeas corpus and ordered McKinney's release from custody unless charges were refiled against him within ninety days of the date of entry of judgment. The State then filed this appeal.

The district court granted the writ of habeas corpus because the use of character evidence to show that McKinney had the propensity to commit the crime for which he was charged resulted in a trial that was fundamentally unfair. This conclusion was based on the introduction at trial of the following evidence:

1. McKinney's mother was murdered at home in her bed by four cuts to her throat and chest with a knife and/or other sharp-edged instrument. The murder weapon was never recovered. There were no signs of forced entry to the victim's home. Present at the time of the victim's murder were her husband, Quentin McKinney, and her son, McKinney. There were no witnesses to the commission of the murder and no confession of guilt.

2. Evidence found at the McKinney home included the following: a pair of McKinney's camouflage pants and a towel stained with blood of the victim's type in the den; a tee shirt of Quentin McKinney's stained with blood of the victim's type in the bathtub; blood stains of the victim's type on the bathroom sink; a pair of ski gloves stained with blood of the vadium's type on a kitchen cabinet; and blood stains of the victim's type on three telephones.

3. Quentin McKinney was wearing a folding "Buck" knife when the police arrived at the

McKinney home. The day after the murder, Quentin McKinney presented the police with a second pair of McKinney's camouflage pants, which he stated he found in the closet with McKinney's other clothes in the bedroom where he (Quentin) had been sleeping on the night of the murder.

4. The prosecutor introduced into evidence a "Gerber" dagger and a "Tekna" dagger that were previously owned by McKinney. The Gerber dagger had been taken and kept in custody by a Los Angeles Police Officer four months before the murder. The Tekna dagger had been given to a friend approximately three months before the murder. The prosecution also introduced into evidence a new Tekna dagger that had been purchased by the prosecution for use at trial.

5. A witness testified that once or twice he had seen McKinney wear a knife strapped to McKinney's leg, and that he had observed McKinney carve the words "Death is His" on a closet door in his dorm room and then stick the knife in the wall

and leave it there. The witness then identified two color photographs of the 'Death is His' writing and the photographs were introduced into evidence. He testified that he had seen McKinney sharpen the knife on several occasions, and that during a power outage at school, McKinney had strapped his knife on, went out somewhere, and stayed out half the night.

6. The county deputy medical examiner testified that the victim suffered four wounds that were caused either by cutting or stabbing, that the wounds could have been inflicted by various types of knives, including a knife sharpened on both sides, a knife sharpened on one side with a thin dull side, a double edged dagger, a weapon with a sharp edge, or a pointed weapon with at least one sharp edge. He testified that two of the four wounds could have been caused by a class of knives such as the new Tekna knife purchased by the prosecution, and that the neck wounds that had caused the death could have been made by any

instrument with a sharp edge, including a razor blade. On cross-examination, he testified that the victim's wounds could have been inflicted by a Tekna, a Gerber, a folding Buck knife, a kitchen knife, or a knife that could be found in a typical home.

7. When McKinney was cross-examined, the prosecutor was permitted to question him about the knives he had previously owned and sold, whether he had a fascination with knives, liked knives, liked owning knives, liked to stop and look at knives in store window, liked to examine knives, often talked about knives, if knives were his hobby, and about why he had owned knives of certain types and colors at time periods before the murder. The prosecutor then asked McKinney whether he "was familiar with some of the various techniques that, for example, are used in combat or that are used by commando type soldiers. . . ." R.T. 751-52. McKinney testified that he once dressed up like a soldier for fun, with a Tekna knife on his arm, and went

to see the movie "Apocalypse Now." The prosecutor then established that McKinney purchased a knife that was "favored . . . by commando type people . . . ." (R.T. 751.)

8. In his argument to the jury, the prosecutor expressed the view that McKinney's history of knife ownership was one of three main areas of evidence that were relevant to prove McKinney's guilt. At another point, the prosecutor stated to the jury that the knives were one of two subjects in which they should be most interested. He argued that the victim was probably killed with a double-edged knife, although the evidence did not actually support this assertion, and related that "fact" to the knives that McKinney had owned and suggested that they could have been the murder weapon. The prosecutor referred frequently to McKinney's knives throughout his argument, and declared that McKinney had an "obsession with knives . . . [i]n particular, double edged daggers." R.T. 1080.

II

The issues before this court are whether (1) the State waived the argument that McKinney failed to exhaust his state remedies, (2) McKinney exhausted his state remedies, (3) McKinney was convicted on the basis of erroneously admitted character evidence, and (4) erroneous admission of character evidence was so significant it rendered McKinney's trial fundamentally unfair in violation of his federal constitutional right to due process.

A.

McKinney suggests that the State's failure to reassert an objection to the report on the basis of his failure to exhaust state remedies constituted a waiver of his right to raise that issue on appeal.

Exhaustion was raised in the State's first return, at the exclusion of all other defenses. The magistrate rejected the State's argument on exhaustion and ordered it to address the merits of the petition. After considering the parties

arguments on the merits, the magistrate issued his report. The report did not address the issue of exhaustion of state remedies. Failure to raise the exhaustion issue again in its objection to the report, which did not touch on this issue, cannot be viewed as consent to the finding of exhaustion or waiver of the right to raise the issue on appeal.

McKinney argues that in this circuit it is well settled that a party's failure to file objections to a magistrate's proposed finding of fact with the district court waives the opportunity to contest those findings on appeal. Greenhow v. Secretary of Health & Human Services, 863 F.2d 633, 635 (9th Cir. 1988); Britt v. Simi Valley Unified School District, 708 F.2d 452, 454 (9th Cir. 1983).

In the context of this case, the question of whether McKinney exhausted his state remedies is essentially a legal question; the Court is not concerned with whether any petition was filed, but rather with whether the petition that was filed was

legally sufficient for purposes of exhaustion. Id. at 454. There is conflicting authority in this circuit over whether failure to raise objections to a magistrates conclusions of law constitutes waiver of those issues on appeal. Compare McCall v. Andrus, 628 F.2d 1185, 1187 (9th Cir. 1980), cert. denied, 450 U.S. 996 (1981) (failure to object to legal conclusion is waiver) with Britt, 708 F.2d at 454 (failure to object to legal conclusion is not waiver). In Greenhow, 863 F.2d at 635, this court noted but did not reconcile the conflicting lines of authority on this issue because intracircuit conflict can only be resolved by the court en banc. Fed. R. App. P. 35(a); Tornay v. United States, 840 F.2d 1424, 1427 n. 3 (9th Cir. 1988). In Greenhow, this Court chose to follow the Britt rule because it had been followed in three Ninth Circuit opinions subsequent to Britt, and might reasonably have been relied upon by the parties as a correct statement of the law in the circuit.

We follow Britt rule in this instance for the same reason. The issue of whether McKinney exhausted his state remedies is a question of law. The State's right to appeal this issue is not waived by failure to object to the magistrate's conclusion that McKinney exhausted his state remedies.

B

The doctrine of exhaustion of state remedies requires McKinney to give the highest state court a "fair opportunity" to consider his federal claims. Picard v. Connor, 404 U.S. 270, 276 (1971). The petition is sufficient for exhaustion purposes if the petitioner describes the "operative facts and legal theory" upon which the federal claims are based. Tamapua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986). Exhaustion requires "only that the substance of the federal claim be fairly presented" to the state court. Id. (citing Picard, 404 U.S. at 278.)

McKinney's petition for a writ of habeas

corpus presented to the California Supreme Court raised ineffective assistance of counsel for failure to file a timely petition for review in that court, which resulted in the los of McKinney's opportunity to present to that Court his arguments with respect to why his conviction should be overturned. The petition referred directly to four grounds on which he believed his conviction should be overturned and then attached his untimely petition for review as an appendix.

In Kim v. Villalobos, 799 F.2d 1317, 1320 (9th Cir. 1986), this court ruled that the petitioner had fairly presented his claims to the California Supreme Court by including his earlier petition to the California Court of Appeal as an exhibit to his petition for writ of habeas corpus. Here, explicit reference to the four issues in the petition and inclusion of the petition for review as an appendix constituted "fair presentation" of the issues to the California Supreme Court.

The fact that the California Supreme Court

summarily denied the petition is no indication that the issues were not fairly presented to that Court. It is well settled in this circuit that a petitioner who files a habeas corpus petition that fairly presents the claims to the highest state court and receives a "postcard denial" has exhausted his or her state remedies. Harris v. Superior Court, 500 F.2d 1124, 1128 (9th Cir. 1974) (en banc), cert. denied, 420 U.S. 973 (1975).

C.

Pursuant to California law, evidence of a criminal defendant's prior conduct is inadmissible if its sole purpose is to show his disposition or propensity to commit the offense charged. Cal. Evid. Code § 1101. Section 1101(a) provides that "evidence of a person's character or a trait of his or her character (. . . or evidence of specific instances of . . . conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." As with Rule 404 of the Federal Rule of Evidence, character evidence may come in "when

relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity . . .) other than his or her disposition to commit such a crime." § 1101(b).

The primary purpose of this rule, known historically as the "character rule," is to ensure that a jury will not convict a defendant of a current charge just because he has been a "bad person in the past. People v. Alcala, (1984) 36 Cal.3d 604, 205 Cal.Rptr. 775. Improper use of character evidence can deny a defendant a fair trial. Michelson v. United States, 335 U.S. 469, 475-76 (1948) ("[T]he state may not show defendant's prior trouble with the law . . . not . . . because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.").

Evidence of McKinney's prior ownership and

use of knives, and of his "fascination" with knives, was erroneously admitted to show that he acted in conformity with his character rather than to connect him to the crime with which he was charged. Although the prosecutor argued that the evidence of prior ownership and use of knives would be useful in connecting McKinney to the crime with which he was charged, none of the three knives introduced into evidence were in McKinney's possession at the time of the murder, and none were ever connected to the crime. Additionally, the medical examiner testified that the murder weapon might have been a kitchen knife, a folding buck knife as was possessed by McKinney's father, a double-edged dagger, or a single-edged knife. Similarly, the fact that McKinney carved the words "Death is His" on his dorm closet door only added to the impression that he had a predisposition for violence, but had no relevance to the crime with which he was charged. Finally, evidence that McKinney liked to dress up like a soldier and had

a fascination with "commando" activities is the type of evidence likely to stimulate an emotional reaction against McKinney. The prejudice to McKinney that resulted from the introduction of character evidence far outweighed the probative value of that evidence.

D.

The question of whether the erroneous admission of character evidence rose to the level of a constitutional violation depends on whether the questionable evidence was so prejudicial that it rendered McKinney's trial fundamentally unfair. McGuire v. Estelle, No. 87-2522, slip op. 4355, 4362 (9th Cir. May 4, 1990).

Had the prejudicial evidence not been admitted, the jury would have been left to weigh evidence that both McKinney and his father were home at the time of the murder, and that both possessed or had access to knives that could have caused the injuries to the victim. A pair of McKinney's blood-stained pants to which Quentin

McKinney may have had access on the night of the murder, Quentin's blood-stained tee shirt, and a pair of blood-stained ski gloves were found at the McKinney home after the murder.

The crucial question at McKinney's trial was who committed the murder. In order for evidence of a prior act to be admitted to show identity, it must have some tendency to prove the defendant's identity as the perpetrator of the charged offense. "[T]he [prior act and the charged offense]must have enough shared characteristics to raise a strong inference that they were committed by the same person . . . . It is not enough that the two acts contain common marks." People v. Riviera, 41 Cal.3d 388, 392 (1985) (en banc).

McKinney's past acts were not similar enough to the acts with which he was charged to be viewed as probative evidence on the issue of whether he committed the murder. The State suggests that the questionable evidence provided a logical link between the crime and the defendant"

"[T]his evidence had, at least, a logical tendency to prove that if petitioner was fascinated with knives, he committed the knife killing; if he lived a 'commando lifestyle', he was guilty of the 'commando killing' of his mother; and that if he scratched the words, 'Death is His' with a knife on his dormitory door, he had a knife that had not been accounted for in the intervening period of time, which includes the date of the knife murder. Given the presence of this logical nexus, it is difficult to conceive of how this trial could be judged to be fundamentally unfair." State's Brief at 42.

The problem with the State's analysis is that this is precisely the type of 'logical nexus' that the character rule is designed to prevent because juries will be inclined to overvalue the evidence. The questionable evidence in this case is prejudicial for the additional reason that it is likely that it stimulated an emotional reaction against McKinney.

Although there was circumstantial evidence of McKinney's guilty, it cannot be said that the erroneous introduction of prejudicial evidence in this case was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967); McGuire, slip op. at 4367 ("Although there was evidence suggesting [petitioner's] guilt, this evidence was certainly not overwhelming"); Dudley v. Duckworth, 854 F.2d 967, 972 (9th Cir. 1988) (error not harmless even when evidence of petitioner's guilt was "impressive but not overwhelming").

Given the inherently prejudicial nature of the evidence, coupled with the improper emphasis placed on this evidence by the prosecutor, we conclude that McKinney's trial was fundamentally unfair.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL SHERIDAN MCKINNEY,	) No. 89-55869
Petitioner-Appellee,	) D.C. No. CV 87-5448-RJK (S)
v.	) ORDER
ROBERT M. REES, Superintendent; JOHN K. VAN DE KAMP,	)
Respondents-Appellants.	)

Before: BROWNING, PREGERSON, Circuit Judges, and ORRICK*/ District Judge

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear

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*. The Honorable William H. Orrick, Senior United States District Judge, District of Northern California, sitting by designation.

the matter en banc. Fed. R. App. p. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX F

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL SHERIDAN McKINNEY,	)	Civil No.
	)	CV 87-5448-
Petitioner,	)	RJK(S)
	)	
v.	)	REPORT AND
	)	RECOMMENDATION OF
REES,	)	UNITED STATES
SUPERINTENDENT, et al.,	)	MAGISTRATE
	)	ON A PETITION FOR
Respondents.	)	WRIT OF HABEAS
	)	CORPUS BY
	)	A PERSON IN
	)	STATE CUSTODY
	)	

This Report and Recommendation is submitted to the Honorable Robert J. Kelleher, United States District Judge, pursuant to the provisions of 28 U.S.C. section 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

BACKGROUND

Petitioner is incarcerated at the Deuel Vocational Institution, Tracy, California. He was

convicted in the California Superior Court of first degree murder, and was sentenced to a state prison term of twenty-six years to life. Petitioner's conviction was affirmed on appeal to the California Court of Appeal, and his petition for writ of habeas corpus to the California Supreme Court was denied.

On August 18, 1987, Petitioner filed a Petition For Writ of Habeas Corpus in this Court. Petitioner claims that he was denied his Federal constitutional right to Due Process of law as a result of the admission at trial of evidence of his prior ownership and use of knives. He argues that the admission of this evidence made his trial fundamentally unfair.

APPLICABLE LEGAL PRINCIPLES

1. In order to be entitled to Federal habeas corpus relief, a state prisoner must show that he is in custody in violation of the Constitution or laws of the United States. 28

U.S.C. 2254(a).

2. The erroneous admission of evidence in a state criminal proceeding does not necessarily impinge on a defendant's Federal Constitutional rights. However, an erroneous evidentiary ruling which is so significant that it deprives a defendant of his right to a fundamentally fair trial constitutes a denial of Due Process under the Constitution of the United States. McGuire v. Estelle, No. 87-2522, slip op. at 4829 (9th Cir. May 8, 1989); Kealohapauole v. Shimoda, 800 F.2d 1463 (9th Cir. 1986); Palmer v. DeRobertis, 738 F.2d 168 (7th Cir. 1984); Batchelor v. Cupp, 693 F.2d 859 (9th Cir. 1982).

3. Pursuant to California law, evidence of a criminal defendant's prior conduct is inadmissible if its sole relevance is to show his disposition or propensity to commit the offense charged. California Evidence Code section 1101; People v. St. Andrew (1980) 101 Cal.App.3d 450, 161 Cal.Rptr., 634. The primary purpose of this rule

(known historically as the 'character rule') is to ensure that a jury will not convict a defendant of a current charge just because he has been a 'bad' person in the past. E.G., People v. St. Andrew, supra; see also United States v. Brown, No. 86-5306, slip op. at 4383, 4386-4387 (9th Cir. April 27, 1989); People v. Alcala (1984) 36 Cal.3d 604, 205 Cal.Rptr. 775.

4. 'Evidence that a defendant had in his possession a weapon that could not have been used in the crime charged leads logically only to an inference that such defendant is the kind of person who surrounds himself with deadly weapons - an inference of no relevant consequence to a determination of guilt or innocence.' People v. De La Plane (1979) 88 Cal.App.3d 223, 240, 151 Cal.Rptr. 843, 852; People v. Henderson (1976) 58 Cal.App.3d 349, 360, 129 Cal.Rptr. 844, 850-851.

5. Pursuant to California law, the trial court has the discretionary power to exclude evidence which is otherwise admissible, if the

probative value of the evidence is substantially outweighed by the probability that its admission will 'create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' California Evidence Code section 352(b).

6. In a Due Process analysis of the admission of questionable evidence, the issue to be determined is whether or not the probative value of the evidence outweighed the prejudice to the accused. McGuire v. Estelle, No. 87-2522, slip op. at 4829, 4836 (9th Cir. May 8, 1989), citing with approval Palmer v. DeRobertis, 738 F.2d 168, 171 (7th Cir. 1984).

EVIDENCE PRESENTED

The Reporter's Transcript (R.T.) of the trial shows the following:

a. Late on the night of January 28, 1984, Betty McKinney was murdered at home in her bed. Her throat had been cut by a knife or other sharp-edged instrument. The murder weapon was never recovered. There were no signs of forced

entry to the victim's home. Present at the home at the time of the murder were two other persons: Quentin McKinney, the victim's husband; and Michael McKinney (Petitioner), her eighteen-year old adopted son who was a college student at that time. Both men testified at the trial. The testimony of each one exculpated himself but left open the possibility of the guilt of the other. There were no witnesses to the commission of the murder, and no confessions of guilt. The prosecution's case was based on circumstantial evidence, most of which raised equivocal inferences.

b. Prior to commencement of the trial, the court and counsel dealt with disputed evidentiary issues, out of the presence of the jury. One of the issues pertained to evidence that Petitioner had owned and used knives at times prior to the commission of the murder. The prosecutor stated his intention to introduce a knife which Petitioner had owned and which had been seized from him and permanently retained by the police in

September of 1983 (4 months before the murder). The prosecutor intended to show Petitioner's "fascination" with certain types of knives. (R.T. 28, 32, 35) Other knives which Petitioner had owned were also going to be presented. (R.T. 29) Defense counsel objected to the introduction of any such evidence as being violative of the "character rule." (R.T. 30-31, 36) The court ruled that the evidence was admissible. (R.T. 36-37)

c. During the testimony of Quentin McKinney, Petitioner's father (by adoption), the prosecutor was permitted to show the witness the "Gerber" dagger (Exhibit 9) and "Tekna" dagger (Exhibit 10) which were previously owned by Petitioner, and asked whether he had ever seen them before or known Petitioner to have owned one of them. (R.T. 116-117) The prosecutor was also permitted to ask whether Petitioner had ever told him that the police had taken a knife from Petitioner in September of 1983. (R.T. 121-122)

d. Los Angeles Police Department

(LAPD) Officer Smith was permitted to testify that on September 25, 1983, [four months prior to the murder] he took a double-edged Gerber knife (Exhibit 9) from Petitioner. (R.T. 373-374)

e. Constantine Potamianos, a friend of Petitioner, was permitted to testify as follows: that prior to the date of the murder, he had known Petitioner to possess dagger type knives which were sharpened on both edges (R.T. 411); that Petitioner had the Gerber and Tekna knives (Exhibits 9 & 10) with him during the summer of 1983 [six months prior to the murder] on a trip to Mexico (R.T. 411-412); that Petitioner gave the Tekna knife (Exhibit 10) to Potamianos prior to Thanksgiving of 1983; that Potamianos gave it to the prosecution shortly before trial (R.T. 414-416; that he knew Petitioner's Gerber knife had been taken from him by the police in September of 1983 (R.T. 415-416).

f. Christopher Roderick, who shared a college dormitory room with Petitioner, was permitted to testify as follows: that between late

August and the beginning of December, 1983, Petitioner had a single-edged knife and a double-edged knife (R.T. 436-437); (the witness made a drawing of the double-edged knife, which was received in evidence) (R.T. 438 & 927); that he became aware in September or October of 1983 that the police had taken a knife from Petitioner (R.T. 439); that he overheard Petitioner on the telephone talking about the knife which the police had taken, apparently upset because it was his favorite knife (R.T.439-440); that Exhibit 11 [a new Tekna knife purchased by the prosecution for use at the trial] closely resembled a knife Petitioner had at school (R.T. 440); that he saw Petitioner wear the knife once or twice strapped to his leg (R.T. 441); that he saw the knife out of its carrier once or twice (R.T. 441); that one evening between Thanksgiving and December 9, 1983, he observed Petitioner use the Tekna knife to scratch some words on a closet door at the dorm (R.T. 445-447); that the words Petitioner scratched on the door were "Death is

his" (R.T. 448); that Petitioner then stuck the knife in the wall and left it there (R.T. 447). The witness then identified two color photographs of the "Death is his" writing on the wall as being accurate depictions; the prosecutor was permitted to place the color photographs in evidence (R.T. 449 & 927). Roderick was again called upon to testify that Petitioner strapped on a Tekna knife at school (R.T. 450); that the knife closely resembled the knife which the prosecutor had purchased for use at the trial (R.T. 455-457); and that Petitioner stuck the knife in the wall after scratching "Death is his" on the door (R.T. 457). And again the color photographs were reviewed with the witness (R.T. 457). Roderick was permitted to testify that he saw Petitioner sharpening the knife two or three times at the dormitory (R.T. 457); that on at lease four occasions he saw Petitioner strap the knife on at school (R.T. 458); that during a power outage at school, Petitioner strapped his knife on, went out somewhere and

stayed out 'half the night' (R.T. 458-459).

g. Dr. William E. Sherry, a county deputy medical examiner, testified in pertinent part as follows: that the victim suffered four wounds which were caused by either cutting or stabbing (R.T. 470); that the wounds could have been inflicted by various types of knives, including: a knife sharpened on both sides (R.T. 483); a knife sharpened on one side with a thin dull side, such as a kitchen or restaurant steak knife (R.T. 483-484); a double edged dagger (R.T. 484); a weapon with a sharp edge (R.T. 493); a pointed weapon with at least one sharp edge (R.T. 493). Dr. Sherry testified that two of the four wounds could have been caused by a class of knives such as Exhibit 11 [the new Tekna knife purchased by the prosecution] (R.T. 496); that the neck wound which caused death could have been made by any instrument with a sharp edge (R.T. 473-474, 496), including a razor blade (R.T. 499). On cross examination, Dr. Sherry testified that the victim's

wounds could have been inflicted by a Tekna, or a Gerber, or a folding Buck knife[1], or a kitchen knife or knives which could be found in a typical home kitchen (R.T. 496-500).

h. Jane Kelsey, a college friend of Petitioner, testified that although she never saw him wearing any knife, Petitioner talked to her about his collection of "valuable knives" on several occasions (R.T. 522).

i. When Petitioner testified, on cross examination the prosecutor was permitted to question him about: a Smith and Wesson knife he previously owned and sold in June or July of 1983 [six or seven months prior to the murder] (R.T. 744-745); why he had purchased the Smith and Wesson (R.T. 745); whether he had a "fascination" with knives (R.T. 746); whether Petitioner "liked" knives (R.T. 746); whether Petitioner "liked"

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1. Petitioner's father, Quentin McKinney, owned a Buck knife.

owning knives (R.T. 746); whether Petitioner "liked" to stop and look at knives in store windows (R.T. 746); whether Petitioner "liked" to "examine" knives (R.T. 746); whether Petitioner often talked to Jane Kelsey about knives (R.T. 747); whether knives were Petitioner's "hobby" (R.T. 747); whether Petitioner "enjoyed" "collecting" and "talking about the different types of knives" he had (R.T. 747). Petitioner was cross examined endlessly about why he had owned knives of certain types and colors at time periods months before the murder took place (R.T. 747 et seq.).

j. In his argument to the jury, the prosecutor expressed the view that Petitioner's history of knife ownership was one of three main areas of evidence which were relevant to prove Petitioner's guilt (R.T. 1007-1008, 1027). At another point, the prosecutor stated to the jury that the knives were one of two subjects they should be "most interested in" in deciding the case (R.T. 1021). He argued that the victim was

probably killed with a double edged knife[2/], and related that 'fact' to knives which Petitioner had owned and which could have been the murder weapon (R.T. 1008-1010, 1076). He then recounted the incident in which a Gerber dagger was taken from Petitioner by police on September 25, 1983, and described its seven-inch double edged blade (R.T. 1011). He failed to point out that the Gerber knife was retained by the police, and could not have been the murder weapon.

Consistent with his theory of the case, the prosecutor recounted the testimony of Petitioner's college roommate that Petitioner had two knives at school, and carved 'Death is his' on a closet door (R.T. 1015). The prosecutor referred frequently to Petitioner's knives throughout his argument (R.T. 1015-1016, 1018, 1021, 1022-1023, 1027, 1045, 1046, 1069, 1080), and went so far as

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2. The evidence did not actually support this assertion. See the summary of the testimony of Dr. Sherry.

to declare that Petitioner "had an obsession with knives - in particular, double edged daggers." (R.T. 1080) The prosecutor made much of the fact that Petitioner had "talked about knives quite often" to a college friend, and seemed to be very proud of his knives (R.T. 1022). In his argument, the prosecutor translated the evidence of Petitioner's prior ownership of knives into the present ownership of "knives" at the time the murder took place (R.T. 1064).

DISCUSSION

The evidence of Petitioner's prior ownership and use of knives was presented by the prosecution on the stated premise that such evidence was directly admissible on the issue of Petitioner's guilt of the murder which was committed on January 28, 1984, and was of crucial importance. Pursuant to this theory, the prosecution was permitted to show: that Petitioner had owned a Smith and Wesson knife, which he sold during the summer of 1983; that he had owned a

Gerber knife, which was permanently taken from him by the police in September of 1983; that he had owned a Tekna knife which was given to a friend prior to Thanksgiving of 1983, although one witness testified that he saw Petitioner with it possible as late as December 9, 1983[3]; that Petitioner "liked" knives, talked about them, wore one strapped to his leg, and used one to carve "Death is his" on a closet door. The prosecutor argued that Petitioner had a "fascination" for knives, and heavily relied on the testimony concerning Petitioner's prior activity with knives in urging a conviction. In summary, the prosecution painted a picture of an obsessive, knife-wielding defendant, and based a large part of its case on the concept that this materially contributed to the proof of Petitioner's guilt.

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3. The witness who testified in court that Petitioner may have had the Tekna knife as recently as December 9, 1983, had initially told the police that he last saw Petitioner with the knife in October of 1983.

It is the opinion of the Magistrate that none of the evidence of Petitioner's prior possession and use of knives should have been admitted in evidence at the trial. The only logical inference raised by such evidence is that Petitioner was the kind of person who surrounded himself with deadly weapons, and he therefore had a disposition or propensity to commit the offense charged. This is precisely the kind of evidence which the 'character rule' as codified in California Evidence Code section 1101 was intended to exclude.

Moreover, even if a technically valid basis for the admission of some small part of this evidence can be put forward, such arguments must fail in light of California Evidence Code section 352. For example, the effect on the jury of testimony of Petitioner having carved 'Death is

his"[4] on the closet door of his college dorm was undoubtedly devastating. The admission of such evidence cannot be justified as helping to pin down a discrepancy in dates, and should have been excluded under section 352.

Due Process analysis requires weighing the value of the improperly admitted evidence against the prejudice suffered by Petitioner as result of its admission. As was noted above, the evidence had little or no value because it raised improper inferences which violated the character rule. The prejudice to Petitioner was substantial; he was tried and convicted as much on evidence of his past history with knives as he was on evidence directly related to the murder. The evidence against Petitioner was entirely circumstantial, and was far from overwhelming. Petitioner's credibility was critical to his defense. After a

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4. No evidence was presented to explain the meaning of these words or to connect them in any way to the crime charged.

review of the entire record of proceedings in the trial court, the Magistrate finds that Petitioner would probably not have been convicted if it were not for the improperly admitted evidence. Therefore, the Magistrate finds that Petitioner was deprived of his right to a fundamentally fair trial under the Due Process Clause of the Constitution of the United States.

RECOMMENDATION

It is concluded that Petitioner is entitled to a writ of habeas corpus. The Magistrate recommends that an Order be issued by the Court: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered issuing a conditional writ requiring the release of Petitioner from custody unless charges are refiled against him within ninety days of the

date of entry of judgment herein.

Dated: June 19, 1989

ROBERT M. STONE
United States Magistrate

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL SHERIDAN McKINNEY	)	Civil No.
	)	CV 87-5448-
Petitioner,	)	RJK(S)
	)	
v.	)	ORDER
	)	ADOPTING
ROBERT M. REES,	)	FINDINGS,
SUPERINTENDENT, et al.,	)	CONCLUSIONS
	)	AND RECOMMENDATIONS
Respondents.	)	OF UNITED STATES
	)	MAGISTRATE

Pursuant to 28 U.S.C. section 636(b)(1)(B), the Court has reviewed the pleadings and other papers herein, the attached reports and recommendations of the Magistrate and the objections to the Magistrate's initial Report and Recommendation, and approves and adopts the Magistrate's findings, conclusions and recommendations. The Court has made a de novo determination of those portions of the report to which objection has been made.

IT IS ORDERED that a conditional writ be granted. Petitioner shall be released from

custody unless charges are refiled against him within ninety days of the date of entry of judgment herein.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate's reports and recommendations and the Judgment by United States mail on Petitioner and the Attorney General of California.

Dated: July 27, 1989

ROBERT J. KELLEHER
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL SHERIDAN McKINNEY Petitioner, v. ROBERT M. REES, SUPERINTENDENT, et al., Respondents.	)	Civil No. CV 87-5448-RJK(S) JUDGMENT

Pursuant to the order of the Court adopting the findings, conclusions and recommendations of the United States Magistrate,

The Petition For Writ Of Habeas Corpus is conditionally granted. Petitioner shall be released from custody unless charges are refiled against him within ninety days of the date of entry of judgment herein.

Dated: July 27, 1989

ROBERT J. KELLEHER
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT

OF CALIFORNIA

MICHAEL SHERIDAN MC KINNEY,	)	
	)	Case No.
Petitioner,	)	CV87-5448-RJK (B)
v.	)	
	)	ORDER
ROBERT M. REES, SUPERINTENDENT, et al.,	)	
Respondents.	)	

In this habeas corpus action, a Return was timely filed and the Magistrate has determined to accept the Traverse, although it was filed seven days late.

Respondent, alleging nonexhaustion of state remedies, has not briefed the merits of the contentions raised in the petition. As to exhaustion, a direct appeal to the California Supreme Court from the affirmance of the California Court of Appeal was rejected when appellate counsel filed one day out-of time. Appellate counsel then

sought review by the High Court by means of habeas corpus, admitting that he was 'ineffective' for having miscalculated the last day upon which to file the appeal, and praying that the court 'grant this petition for writ of habeas corpus and reverse the trial court judgment of conviction' on the 'issues . . . contained in the petition.' Return, page 308, emphasis added. The issues so contained include all of those sought to be raised in this action. Return, pp. 307-308. Appellate counsel asked the California Supreme Court to 'consider the merits of issues not preserved on appeal by granting the petition for writ of habeas corpus.' Return, page 213. The same issues unsuccessfully presented to the California Court of Appeal, and which are raised in this action, were then briefed to the California Supreme Court. Return, pp. 314 et seq. It was this petition which the latter court denied on September 24, 1986. Return, page 4.

The Magistrate now accordingly holds that

petitioner has sufficiently exhausted in California courts the issues he seeks to present herein. His subject claims have been fairly presented to the highest court of the state. Picard v. Connor, 404 U.S. 270, 276-78 (1971); Tamapua v. Shimoda, 795 F.2d 261, 262 (9th Cir. 1986).

IT IS THEREFORE ORDERED that the respondent herein, or the California Attorney General, shall serve and file a Supplemental Return, addressing the merits of the petition, on or before March 28, 1988.

IT IS FURTHER ORDERED that petitioner may serve and actually file his Supplemental Traverse on or before May 2, 1988. The matter shall stand submitted on the papers then on file on the earlier of the court day after the filing of the Traverse

on May 3, 1988.

DATED: February 19, 1988.

VOLNEY V. BROWN, JR.
United States Magistrate

MINUTES

CALIFORNIA SUPREME COURT

San Francisco,
September 24, 1986

Orders were filed in the following matters denying petitions for writs of habeas corpus:

Crim. 25726 - In re McKinney (Michael Sheridan) on Habeas Corpus.

NOT TO BE PUBLISHED
IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,	
	2d Crim. No.
Plaintiff and Respondent,	B011378
v.	(Super.Ct.No. A399033)
MICHAEL SHERIDAN McKinney,	
Defendant and Appellant.	

APPEAL from the judgment of the Superior Court of Los Angeles County. Michael Berg, Judge. Affirmed.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Appellant.

John K. Van De Kamp, Attorney General, Andrew D. Amerson, Supervising Deputy Attorney General, and Lauren D. Dana, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Appellant appeals from the judgment in which he was convicted of the first degree murder of this adoptive mother. He principally contends that statements, taken in violation of his rights under Miranda v. Arizona (1966) 384 U.S. 436, were unlawfully used for impeachment purposes, and he also urges that the trial court erred in the admission of other evidence.

PROCEDURAL HISTORY

The guilty verdict herein was rendered by a jury which also found that appellant, in the commission of the crime, had used a knife within the meaning of Penal Code section 12022, subdivision (b). Appellant was sentenced to state prison for 25 years to life plus one year for the use of the knife.

STATEMENT OF FACTS

Appellant's mother, Mrs. Betty M. McKinney, was killed in her own bedroom on the night of January 28, 1984, by having her throat cut. In the

house at the time were appellant and his adoptive father, Mr. Quentin McKinney, a truck driver.

Earlier that evening, shortly after dinner, appellant, a bright college student with a high I.Q., who was home for the semester break, asked his parents for a $3,000 loan to enable him to continue in college. The victim "just flat said no." Appellant indicated he was going to attend a movie with a friend. At about 8:30 p.m., Mr. McKinney went to sleep in a spare bedroom. Appellant was still in the house and Mrs. McKinney was watching T.V.

Between 11 and 11:30 p.m., Mr. McKinney was awakened by a loud noise. He arose to find the lights on in the den where appellant slept. No lights were on in his wife's bedroom. Hearing a "growling" sound from that bedroom, however, he entered the room to find his wife bleeding from the mouth. At first Mr. McKinney thought his wife was hemorrhaging as a consequence of circulatory problems for which she had had surgery. As Mr.

McKinney attempted to assist his wife, he then saw that blood was coming from her neck. He frantically tried to call for assistance on the two phones that were located in the bedroom and failing that yelled loudly for his son. When appellant respondent, Mr. McKinney told him to "get the paramedics." Appellant grabbed the larger of the two phones, a white one, and went into the dining room where he began talking and Mr. McKinney heard the words "operator."

Appellant returned to the bedroom, put the telephone on the floor and said "they're coming." Expecting to hear the sound of sirens momentarily, Mr. McKinney continued to try to aid his wife. When appellant suddenly uttered an obscenity and broke the telephone on the floor, Mr. McKinney told him to leave the house and to flag down a police car. Appellant departed only to return saying he had seen no police car. Mr. McKinney also instructed his son to run to nearby business establishments where pay telephones were located

and to call for help. Appellant again department for a time and when he returned "said he didn't have a dime for the phone." Mr. McKinney told appellant that he didn't need a dime but could just push the "O." Appellant again left the house.

Shortly thereafter, Mr. McKinney, who had been in the military service where he had experienced the death of others, heard what he termed a "death rattle" from his wife. Believing she was dead, Mr. McKinney went into the den to try the telephone there. He still had heard no sirens but knew that paramedic response was normally rapid. When he picked up that telephone, it was inoperable.

Mr. McKinney then changed some of his bloody clothing and went next door where he yelled for his neighbor to call the paramedics. When Mr. McKinney came back to the front door of his house, he found his son standing there. Mr. McKinney said to him, "If you have done something to Mom, I'll have to get after you." Appellant made no reply.

Shortly thereafter, the paramedics arrived along with police. However, Mrs. McKinney was already dead.

In the opinion of the deputy medical examiner who performed an autopsy on Mrs. McKinney's body, the cause of death was an eight-inch knife wound on the victim's neck which had severed both a carotid artery and a jugular vein. Additionally, Mrs. McKinney had suffered stab wounds under her left jaw, to her chest and to the back of her neck. Only the first of the four knife wounds was a fatal one. In the doctor's opinion, the neck and chest stab wounds had been caused by a knife sharpened on both edges.

The police crime scene investigation disclosed no signs of forced entry. A pair of dark camouflage pants belonging to appellant bore blood stains of the same blood type as the victims. Officers also found a pair of blood stained men's ski gloves lying on a kitchen counter. The blood stains were likewise of the same blood type as Mrs.

McKinney's.

A telephone cord in the victim's bedroom had been cut by a sharp single-bladed tool and, according to expert testimony, not be any tool such as scissors or shears.

Appellant had owned several knives, including a double-edged "Tekna" knife. In the opinion of the deputy medical examiner, a double-edged knife, similar to the one appellant owned, could have caused the stab wounds to the victim's chest and neck. Appellant had been observed by acquaintances sharpening a knife on occasions. Witnesses also testified that in December 1983, appellant had used a knife to scratch on a dormitory room closet door the inscription "Death is his." On previous occasions, appellant had also strapped the Tekna knife to his leg while wearing either jeans or camouflage pants.

Appellant's father owned a folding "Buck" knife which police confiscated and examined. Laboratory analysis proved there were no blood

stains anywhere on this knife.

Appellant's father testified that appellant did not get along with his mother, and Jane Kelsey, a close friend of appellant's mother, testified appellant was resentful towards his parents because they pushed him through schools and always expected too much of him. In an introspective letter written by appellant to a girlfriend, appellant at length discussed that he felt "neglected, unloved, even abused" by his parents who were "disappointed with me." He wrote that God had given him a "special gift" (i.e., his high intelligence), and that therefore his parents and teachers had "great expectations for me." He stated that his parents "were domineering and possessive beyond belief" and that he was "starved for affection." He expressed the thought that he had turned his life into a junkyard and stated that "I cannot emphasize how much I am going to need my good friends."

Valentina Montessori testified that during the preceding Christmas break, appellant had

visited her at her home in Vancouver, British Columbia, Canada. During the time that they were together in the outdoors, appellant wore the ski gloves which were found blood-stained in his home on the night of the murder.

DEFENSE

Appellant testified in his own behalf and denied killing his mother. According to his story, he arrived home from the movie theatre at exactly 11 p.m. and was let into the house by his mother. He immediately went to bed wearing headphones and listening to a 45-minute cassette tape recording. When he awoke the tape recording had run out, and he got up to go to the bathroom. As he went toward the bathroom, he glanced into the bedroom to see his father sitting on the side of his mother's bed calling her name. there was blood everywhere.

Appellant tried to call for assistance but the phones did not work because the cords had been cut. He eventually summoned the paramedics from a pay telephone.

Appellant admitted ownership of the blood-stained camouflage pants but testified that he no longer wore those as he had outgrown them. He and his close friend, Constantine Potamianos, testified that the blood-stained gloves were not his and that another pair, given to the prosecution by Potamianos, were in fact the gloves he had worn in Canada. His friend also testified that appellant had given him the Tekna knife prior to Thanksgiving of 1983.

APPELLANT'S CONTENTIONS

Appellant contends that the trial court committed prejudicial errors by admitting the following into evidence:

1. Appellant's prior inconsistent statements obtained by police in violation of Miranda.

2. Appellant's possession of two knives prior to the killing of the victim.

3. A letter written by appellant to a friend expressing resentment and hostility toward

his parents.

4. Evidence of appellant's obsession with knives and with a commando lifestyle.

DISCUSSION

I

Appellant contends that the trial court improperly admitted prior inconsistent statements to impeach his trial testimony, statements taken by police in violation of Miranda v. Arizona, supra, 384 U.S. 436. We uphold the trial court's finding that appellant was properly advised of his Miranda rights and had voluntarily waived them.

The case of People v. Bestelmeyer (1985) 166 Cal.App.3d 520, summarizes the standards of review pertinent here: "It is the function of the trial judge to determine whether the defendant did in fact knowingly and voluntarily waive his right to remain silent and his right to have the assistance of counsel. This determination is to be made based on the totality of the circumstances surrounding the interrogation. (Fare v. Michael C.

(1979) 442 U.S. 707; In re Brian W. (1981) 125 Cal.App.3d 590.) The assertion of privilege or its waiver constitutes a question of fact which can only be decided after talking into account the special circumstances of each case. (People v. Turnage (1975) 45 Cal.App.3d 201.) Where the evidence is in conflict, the trial court's findings in this regard will be accepted by the appellate court unless it is palpably erroneous or entirely unworthy of belief. (People v. Brockman (1969) 2 ;Cal.App.3d 1002; People v. Hutchings (1973) 31 Cal.App.3d 16; People v. Watson (1977) 75 Cal.App.3d 384.)" (People v. Bestelmeyer, supra, at p. 526.)

Two separate police interviews of appellant conducted by Los Angeles Police Department Detectives Gilbert Freeze and John Bunch are at issue herein. The first interview occurred at 6:45 a.m. on January 29, 1984, shortly after appellant's father had been interviewed and released. In this first interview, after Detective Bunch advised

appellant of his so-called Miranda rights, Detective Bunch asked him if he understood those rights. Appellant answered "yes." Detective Bunch then asked appellant if he gave up his right to remain silent to which appellant replied, "Sure, why not?" Detective Bunch then asked if appellant gave up his right to speak to an attorney, and appellant responded, "I guess so." Detective Bunch asked, "Is that a yes?" and appellant replied, "OK. I mean why? Why do I need an attorney?" The officer responded, "I don't know. That's what we're here to find out. I don't know if the need an attorney or not." The officer then commenced with his interview informing appellant that he was suspected of killing his mother. The trial court found that appellant had waived his right consult with an attorney prior to asking the question, "Why do I need an attorney?"

Later that day, appellant was formally arrested and booked. Appellant also agreed to take a polygraph examination but none was administered.

On January 31, 1984, at 6:15 p.m., appellant was readvised of his rights under the Miranda decision, and he again indicated that he understood those rights and he also gave up his right to remain silent. Next, Detective Bunch asked appellant if he gave up his right to an attorney prior to being interviewed, and appellant replied, "I have one question. Can I get an attorney tonight." Detective Bunch answered, "I don't know. If you want an attorney, we won't be talking because I cannot talk to you if you want an attorney." Thereupon, appellant respondent, "See, O.K. I want an attorney, but I want to talk to you now so I want to talk to you without the attorney. So I guess I should answer yes to that question. But I also want to talk to an attorney." Detective Bunch stated, "But my problem is I can't get an attorney here now" and appellant stated, "You can't?" The detective then said, "No" and appellant stated, "I want to talk to you then." Detective Bunch further asked, "O.K. Is that what

you are saying is you will talk to me?" and appellant answered, "Yes." Detective Bunch again asked, "You will talk to me without an attorney being present?" Appellant replied, "Yes I will." During the discussion of the availability of an attorney, Detective Bunch informed appellant that an attorney might not be available until his arraignment but the detective also stated that he possibly had an after-hours phone number for the public defender.

Appellant testified on this issue that the officer's statement that an attorney was not available until the arraignment was a factor in his decision to talk with the police. He had no money to hire an attorney and would have waited a short while for an attorney before talking to the police. Appellant also testified that during the second interview, it was his desire to talk with the investigators whether or not there was an attorney available.

Our review of the totality of the

circumstances in this case convinces us that appellant waived his Fifth Amendment rights on each of the two occasions and that he at no time in fact invoked those rights during the interviews.

Appellant relies on People v. Superior Court (Zolnay) (1975) 15 Cal.3d 729, 736, for the proposition that if a suspect "'indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.'" (Emphasis omitted.) That case is distinguishable. In that case, both the defendant and his companion waived their Miranda rights and spoke with police at length. The next day, they returned and again talked with police for at least an hour. Finally, one of the two stated either "I guess we need a lawyer" or "Do you think we need an attorney." The officers then referred the two to a telephone directory which listed local attorneys but thereafter told the suspects that they were guilty and urged them to continue talking with them. The differences

between the Zolnay situation and the instant case are fairly obvious. The defendant's statement there that he needed an attorney came long after the previous waiver of the right to counsel and after extended questioning. The suspects there had also asked the officers to recommend an attorney and at that point they were referred to the telephone directory. The circumstances there clearly showed that the defendant was in fact invoking his constitutional right. Nonetheless, the interrogating officers persisted in pressuring the defendant for an admission of guilt.

No such tactics are revealed in the instant case. There are no softening up statements or questions as in People v. Hinds (1984) 154 Cal.App.3d 222, 235, or People v. Munoz (1978) 83 Cal.App.3d 993, 995-996. Rather, when appellant inquired about an attorney, the officers did no more than seek clarification of his desires. "Clearly the authorities permit clarifying questions even after a suspect says he asserts his

constitutional rights, and that proposition finds support in Miranda v. Arizona, [supra], 384 U.S. 436, 485. Nothing in Miranda precludes the police from clarifying with the suspect whether he understands the questions relating to his constitutional rights and whether by his answers he intends to waive them. It is just as important for police to make certain a suspect means what he says in his answer which asserts his rights as it is to ascertain if he understands the questions sufficiently to knowingly and intelligently waive those rights. Although after a suspect has indicated he wishes to invoke his Miranda rights the police are prohibited from asking substantive questions which portend to develop the facts under investigation (People v. Turnage, [supra], 45 Cal.App.3d 201, 211), they are permitted to clarify whether he comprehended his rights, the question and his answer or intended to waive his Miranda rights, and explain them to him." (In re Brian W., supra, 125 Cal.App.3d 590, 599-600.) Hence, it has

been held that "when a suspect is indecisive and ambiguous in his assertion of his Fifth Amendment rights, the officers may make further inquiries concerning it . . . ." (People v. Marshall (1974) 41 Cal.App.3d 129, 135.)

The questions and responses of the police and appellant in the first interview are not unlike the exchange which took place in People v. Maynarich (1978) 83 Cal.App.3d 476 wherein the defendant's statement was held admissible. There, upon being told that an attorney could be appointed for him, the defendant stated, "But will it make a difference?" The officer replied, "Well, that's your choice. You understand that you are entitled to an attorney?" Defendant replied, "Yes" and finally, "Well, I'll need one, but, you know, you can go ahead and ask me questions." A more explicit waiver followed and the ensuing interview was ruled admissible. (Id., at p. 479.) In the present case, to appellant's question "Why do I need an attorney?" the officer answered, "I don't

know. That's what we're here to find out. I don't know if you need an attorney or not."

The second interview is reminiscent of the waiver circumstances in People v. Turnage, supra, 45 Cal.App.3d 201, 211, footnote 5, in which the admission of the defendant's statements were upheld on appeal. There the waiver conversation between the officer and the defendant was as follows: "A: . . . Yes . . . attorneys and stuff like that I can't afford, one right at the moment. Q: Well, this says that an attorney can be appointed for you. You know if you can't afford one, one will be appointed to represent you. A: Well, I feel I need one. Q: O.K., you'd rather not talk about the case. A: No, I don't mind talking about the case, but I just feel I want it noted that I want an attorney.

"Q: Ok, you want it noted that you do want an attorney? A: Yes, but I don't mind talking to you. Q: Ok. You understand, then, everything that we've talked about and that you do want an

attorney but not necessarily at this particular second. Is that right? A: Yes." (Ibid.)

The court in Turnage observed, "Amid such uncertainly the officer was justified indeed in making further inquiries concerning appellant's intentions. The answers given to these clarifying questions abundantly disclose that appellant was willing to talk about the case and also that he wished to utilize the assistance of an attorney at a later time . . . " (People v. Turnage, supra, at p 212.)

Here, by telling appellant that "IF you wan an attorney, we won't be talking because I cannot talk to you if you want an attorney," Detective Bunch made it absolutely clear that appellant could cut off any questioning simply by indicating his desire for an attorney. Appellant's response indicates his perception of that point as well as his desire to speak to the officers without an attorney: "See, O.K. I want an attorney, but I want to talk to you now. So I want to talk to you

without the attorney. So I guess I should answer yes to that question. But I also want to talk to an attorney."

After a discussion about the availability of an attorney and the officer's statement that he possibly had an after-hours telephone number for the public defender, appellant stated "I want to talk you then." To clarify any lingering ambiguity, the officer inquired further: "O.K. Is that what you are saying is you will talk to me?" Appellant answered "Yes" and the officer inquired again "You will talk to me without an attorney being present?" To that last question, appellant gave the unambiguous answer which clearly constitutes a waiver, "Yes, I will."

We are thus fully satisfied that appellant did not invoke his Fifth Amendment rights and just as clearly waived them. Furthermore, there is obviously no issue of voluntariness related thereto since there were no promises nor any hints of favors nor any direct or subtle threats made to

appellant. And, of course, he himself testified during the hearing on the statements that even during the second interview, it was his desire to talk with the investigator whether or not there was an attorney available. Hence, the trial court properly admitted the statements.[1]

II

Appellant's Prior Possession of Knives

Appellant contends that evidence he possessed two knives prior to the killing of his mother was irrelevant. He bases this contention of irrelevancy on his assertion that the record shows that he did not possess "a knife at any time near the homicide." The assertion is without merit.

"The trial court is vested with discretion in admitting or rejecting proffered evidence and

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1. In light of our conclusion, it is unnecessary to address the People's secondary argument that even if these statements were taken in violation of Miranda, they could be used to impeach a defendant who testifies. (Harris v. New York (1971) 401 U.S. 222, 225-226; c.f., People v. Disbrow (1976) 16 Cal.3d 101, 113.)

its decision will not be reversed on appeal unless there is a manifest abuse of that discretion . . . (Cal. Const., art. VI, § 13; Evid. Code, §§ 352, 353, 354.)" (People v. Wein (1977) 69 Cal.App.3d 79, 90.)

The two knives in question each had dagger-type or double-edged blades. The first, a folding knife, was referred to as a "Gerber" knife and the second, a knife in a plastic carrier with straps, was the "Tekna" knife. It was undisputed that appellant's original Gerber knife had been confiscated by police in September 1983 as an illegally possessed dagger. Appellant's friend, Constantine Potamianos, testified that appellant had given him the Tekna knife prior to Thanksgiving of 1983. The killing of Mrs. McKinney occurred on January 28, 1984. However, appellant's roommate, Christopher Roderick, testified that in early December, shortly after Thanksgiving 1983, appellant came into the dormitory room the two shared and began scratching on the closet door with

a Tekna knife. It was on this occasion that appellant etched the words "Death is his" on that door.

Roderick also testified that he overheard a conversation between appellant and Potamianos after appellant's Gerber knife had been confiscated by the police. In that conversation, appellant referred to that knife as one of his favorites and an expensive one and appeared to be upset about its loss. This testimony also called into question Potamianos' story that appellant had become disinterested in knives after the loss of the knife to police in September.

It is well established that where a specific weapon used to commit a crime is not known, weapons connected to the defendant which could have been used to commit the crime are admissible as circumstantial evidence that defendant was the perpetrator. (People v. Riser (1956) 47 Cal.2d 566, 577; see also, People v. Tahl (1967) 65 Cal.2d 719, 741; People v. De La Plane

(1979) 88 Cal.App.3d 223, 239-240; People v. DeVaney (1973) 33 Cal.App.3d 630, 635; People v. Rinegold (1970) 13 Cal.App.3d 711, 720-721.)

The circumstances of the instant case present obvious relevancy. The deputy medical examiner who performed the autopsy on the body of the victim testified that both the Gerber knife and the Tekna knife, as double-edged knives, were capable of producing the wounds on the body.

The Gerber knife presented at trial was the one confiscated in September 1983 by police and as such was unavailable to appellant to commit the murder. The testimony of Potamianos, if accepted at face value, indicated that the original Tekna knife was unavailable to appellant at the time of the killing. However, testimony of the roommate, Christopher Roderick, showed that either appellant had acquired a second Tekna knife or Potamianos' testimony was false or inaccurate. Moreover, the People had to refute the inference that a Buck knife belonging to appellant's father was the only

knife in the house available for the killing.

Lastly, appellant's bloody camouflage pants which were linked by blood-type to the victim's death, had additional significance. Appellant had worn these pants in conjunction with the Tekna knife, and on two occasions -- once while attending the movie "Apocalypse Now" and the other during a nighttime power outage at his college -- he had strapped the Tekna knife either to his arm or leg before going out.[2/]

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2. The likelihood is that the Tekna knife, presented by Potamianos to the prosecution long after appellant had been arrested, was not in fact the Tekna knife appellant had previously possessed since it did not have straps on the plastic carrier as had the knife previously described by witnesses. Thus, one view of this evidence was that it indicated that Potamianos, in conspiracy with appellant, had proffered both the Tekna knife and a pair of black ski gloves to counter prosecution evidence (1) that the bloody ski gloves found in the kitchen were appellant's and (2) that appellant's Tekna knife had disappeared right after the murder. For this reason, the prosecution presented to the jury a second Tekna knife complete with plastic carrier and straps which witnesses identified as more fully resembling appellant's Tekna knife. Appellant does not raise the point, but we note that "[w]here the actual weapon is not found, it

Hence, we conclude that not only is appellant's assertion that he did not possess "a knife at any time near the homicide" an incorrect assessment of the facts, but under the circumstances of the case, the probative value of the evidence far outweighs any prejudicial effect.

III

Appellant further contends that he was prejudiced by the trial court's admission of evidence concerning his obsession and use of knives and commando garb, by the admission of his roommate's testimony concerning his behavior with knives and by the admission of a letter to a girlfriend. He asserts that such matters constituted evidence of bad character when he himself had not put his good character into

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is quite proper to introduce a replica or similar weapon to the jury as an example of the type of weaponry that might have been used in a crime. (See People v. Wiley (1976) 18 Cal.3d 162, 176; People v. De La Plane, [supra], 88 Cal.App.3d 223, 239.)" (People v. Frausto (1982) 135 Cal.App.3d 129, 143.)

evidence and that they were in any event irrelevant. Appellant's contentions are not well taken.

"Evidence is admissible in a criminal case if it tends logically, naturally, and by reasonable inference to establish any fact material for the People or overcomes any material matters sought to be proved by the defense. (People v. Poland (1963) 219 Cal.App.2d 422, 427; Evid. Code § 210.) The preference is to admit any evidence which may illuminate the transaction or give any weight in determining the issue; the strength or weight of the evidence is determined by the jury." (People v. Demond (1976) 59 Cal.App.3d 574, 588-589.)

"[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence (People v. Sykes [1955] 44 Cal.2d 166; People v. Gonzales [948] 87 Cal.App.2d 867)." (People v. Lopez (1969) 1 Cal.App.3d 78, 85; see

also People v. Dominguez (1981) 121 Cal.App.3d 481, 498-499.) Likewise, evidence showing quarrels, antagonism, animosity, or enmity between the accused and the victim of a violent offense is proof of motive to commit such offense. (People v. Benton (1979) 100 Cal.App.3d 92, 98; People v. Daniels (1971) 16 Cal.App.3d 36, 46; People v. Lopez, supra, 1 Cal.App.3d 78, 85.)

As set forth in the preceding discussion concerning the admissibility of evidence of appellant's knives, appellant's possession of such knives was without doubt relevant to show his opportunity to commit the killing of his mother and to refute any implication that his father had used his Buck knife to kill the victim. The testimony of appellant's roommate, Christopher Roderick, was admissible to demonstrate that appellant had not divested himself of his knives prior to Thanksgiving 1983 as appellant's friend, Potamianos, testified. As noted previously, appellant associated camouflage pants with wearing

a knife. The bloody camouflage pants found in the house connected the wearer of those pants with the murder. Thus, the connection of appellant's previous possession of the Tekna knife with the camouflage pants was highly relevant.

Appellant's scratching of the phrase "Death is his" on the closet door in his dormitory room is in some respects obscure. It perhaps tends to indicate that appellant's fascination with knives bordered on morbid associations. However, the phrase was more especially relevant on another score. Quite arguably, the peculiar nature of the phrase caused the date and location of appellant's scratching on the closet door to be etched in Roderick's mind, thus proving that appellant was in possession of the probable murder weapon after Thanksgiving of 1983.

Evidence from appellant's roommate and other acquaintances concerning his display and comments concerning his "collection" of knives was also highly relevant to refute the testimony of

Potamianos that after appellant had had the Gerber knife confiscated, he had lost interest in knives and thus had made a gift of his Tekna knife to Potamianos. This relevant evidence gave rise to the clear inference that appellant either had not given Potamianos the knife or had acquired another one similar to it as well as possibly reacquiring a Gerber knife.

Appellant contests on the same grounds of irrelevancy a letter which he wrote to Pam Kouba. That letter amply displays appellant's animosity toward as well as estrangement from his parents. Thus, in conjunction with the fact that appellant's mother had, on the night of her murder, refused to underwrite a student loan, the letter portrays appellant's motive for his mother's murder. In the letter, appellant describes his home as "a prison" and relates that he "felt neglected, unloved, [and] even abused." He explains that these feelings stemmed from his belief that his parents "were disappointed in me." He states that "my parents

were domineering and possessive beyond belief." He also ominously closed the letter with the statement that "I cannot emphasize how much I am going to need my good friends." In other conversations with his acquaintances he described similar feelings and indicated that he was bitter about the fact that he was an adopted child. The evidence did provide a motive for appellant and showed his incentive to kill his mother. Its probative value exceeded any prejudicial effect and the trial court did not err in admitting the evidence. (People v. Lopez, supra, 1 Cal.App.3d 78, 85.)

DISPOSTION

The judgment is affirmed.

NOT TO BE PUBLISHED

BOREN, J.*/

We concur:
HANSON (L. Thaxton), Acting P.J.
LUCAS, J.

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*. Assigned by the Chairperson of the Judicial Council.

PROOF OF SERVICE UNDER RULE 29.5(c)

Re: ANA M. OLIVARES, etc. v.
MICHAEL S. McKINNEY

I, F. MITCHELL, declare that I am over 18 years of age, and not a party to the within cause; my business address is 300 South Spring Street, Los Angeles, California 90013; I served a copy of the attached **PETITION FOR WRIT OF CERTIORARI** on each of the following by placing same in an envelope addressed as follows:

Charles D. Weisselberg, Esq. (3 copies)
Post-Conviction Justice Project
University of Southern California
University Park, **LAW CENTER**
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I declare under penalty of perjury that the foregoing is true and correct. Executed on OCT 14 1993 at Los Angeles, California

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Supreme Court, U.S.
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No. 93-602

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ANA M. OLIVAREZ, WARDEN OF THE
DEUEL VOCATIONAL INSTITUTION
OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MICHAEL SHERIDAN McKINNEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should review fact-bound rulings by the District Court and the Court of Appeals that the admission of inflammatory propensity evidence denied Mr. McKinney a fundamentally fair trial, in violation of the Due Process Clause.

2. Whether the grant of habeas corpus relief, premised upon both the ancient prohibition against the use of propensity evidence and the long-standing constitutional guarantee of a fundamentally fair trial, announced a "new rule" under Teague v. Lane, 489 U.S. 288 (1989).

3. Whether the District Court's and the Court of Appeals' legal conclusions regarding the legal relevance of the propensity evidence violated the principle, set forth in Sumner v. Mata, 449 U.S. 539 (1981), that state court determinations of fact are presumed correct.

4. Whether the District Court and the Court of Appeals correctly ruled that the propensity evidence was not legally relevant to any essential elements of the prosecution's case.

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STATEMENT OF THE CASE

On the night of January 28, 1984, Betty McKinney died in her bed of severe knife wounds to her throat and chest. Petition for Writ of Certiorari ("Pet.") at 11. Both her husband, Quentin McKinney, and her son, Respondent Michael McKinney, were in the house at the time. Pet. App. F at 145. There were no signs of forced entry into the home. Id. at 144-145. Both men were taken into custody and interrogated. Respondent's father, Quentin, had a folding buck knife in his possession, yet he was released the next day. Pet. App. A at 88; Pet. App. D at 119-120. Michael McKinney, on the other hand, an 18 year-old college student with no prior history of violent behavior, was detained, booked, tried, and found guilty of his mother's murder.

During the trial, the prosecution presented a case founded primarily upon circumstantial evidence, most of which raised ambiguous inferences. No murder weapon was ever found. Pet. App. F at 144-145. No testimony established what kind of knife caused the fatal wounds. Id. at 150. There were no eyewitnesses. The prosecution introduced a pair of dark camouflage pants and a pair of ski gloves, both soaked in Mrs. McKinney's blood. Pet. App. D at 119. Though the prosecution claimed that both of these items were owned and worn by Michael McKinney on the night of the murder, there was no direct evidence that McKinney had worn these items. In fact, McKinney testified that he had outgrown the pants and had never owned the ski gloves. Reporter's Transcript ("R.T.") at 657, 669-671, 727-735. Either McKinney or his father could have worn these items during

the last minutes of Betty McKinney's life. Moreover, a shirt owned by Quentin McKinney, soaked in Mrs. McKinney's blood, was also found at the crime scene. Pet. App. D at 119.

Without any conclusive evidence, the prosecution hinged its case upon inflammatory propensity evidence. The prosecution tried to portray Mr. McKinney as living a so-called "commando lifestyle." Pet. App. A at 101-102; Pet. App. I at 181. With this evidence, the prosecution implied that Mr. McKinney was more likely than not to have murdered his mother. Pet. App. A at 101-102. For example, during the cross-examination, the prosecutor asked Mr. McKinney if he "was familiar with . . . techniques . . . used by commando type soldiers." R.T. 751-752. The prosecutor asked Mr. McKinney about daggers that have black blades, so as not to reflect light, and whether black blades are "the sort of knives that are favored . . . by commando type people . . . ." R.T. 751; Pet. App. A at 102. The prosecutor elicited testimony from Mr. McKinney's roommate that "during a power outage at school, [McKinney] strapped his knife on, went out somewhere and stayed out 'half the night.'" Pet. App. F at 149-150.

The prosecutor also tried to link Mr. McKinney's so-called "commando lifestyle" with his wearing of camouflage pants, at the time a widespread college fad. Pet. App. A at 93; R.T. 459-460. The prosecution even went so far as to elicit testimony that Mr. McKinney had once "dressed up like a soldier," with a knife on his arm, to see the movie "Apocalypse Now." R.T. 753-755. These few examples are not exhaustive, and after all this extensive and highly prejudicial testimony, the prosecutor still never really

explained what a "commando lifestyle" was, merely leaving it to the jury's imagination.

To further support the "commando lifestyle" claims, the prosecution also introduced into evidence three military-type daggers, two of which had been owned by Mr. McKinney at one time or another. Two of the knives had no possible connection to the crime. One knife had been confiscated by the police in September 1983, four months before the murder took place. Pet. App. A at 88. Mr. McKinney originally bought that knife after he was repeatedly robbed on his way home from work. R.T. 747. Another had never been owned by Mr. McKinney. The prosecutor himself purchased this knife, a black bladed "Tekna" dagger, for use during the trial. Pet. App. D at 120. McKinney bought the last of the three knives in 1983. R.T. 667-668. Costa Potamianos, a friend of Mr. McKinney, testified that McKinney gave him this knife before Thanksgiving, 1983, several months before Mrs. McKinney died. Pet. App. A at 88. Mr. McKinney's college roommate, however, testified that he had seen Mr. McKinney with a similar knife in December, 1983. Pet. App. A at 89.

Mr. McKinney's counsel properly objected to the introduction of the knives. He pointed out that the introduction of these knives and the testimony about them could only be used as evidence of Mr. McKinney's character, leading the jury to "infer that he is the kind of person who is bad." R.T. 31. When pressed by the trial judge, the State responded that the knives were relevant to the case, stating that the "blade configuration" of the knives would match Mrs. McKinney's wounds. R.T. 376. Upon these assurances, the trial court admitted the knives. R.T.

36; R.T. 379.

The coroner's testimony did not support the prosecutor's bald statement. The coroner testified that a simple home kitchen knife could have inflicted Betty McKinney's wounds. Pet. App. F at 150. There was nothing distinctive about the wounds which would allow the coroner to say that they were created by a dagger as opposed to, say, a one-edged kitchen knife. Thus, the prosecution was ultimately unable to demonstrate any link between the knives and Betty McKinney's wounds.

One other bit of highly inflammatory evidence reached the jury. The prosecution put Christopher Roderick on the stand to testify that sometime after Thanksgiving, 1983, Mr. McKinney had scratched the words "Death is His" on the closet door of his dormitory room with a dagger, and then menacingly stuck the knife into the wall. Pet. App. F at 148-149. The prosecution put in color photographs of the scratching. Pet. App. F at 149. As the District Court held, this evidence was "undoubtedly devastating." Pet. App. F at 157.

None of the so-called "commando lifestyle" evidence or "Death is His" evidence should have gone to the jury. None of this evidence was even remotely probative of anything resembling opportunity, motive or modus operandi. The wounds suffered by Mrs. McKinney were not the signature slashes of any particular knife or style of attack, "commando" or otherwise. And Mr. McKinney had no history of violence; none of this disputed evidence could come in as a prior similar act. Any type of knife could have accomplished the murder, and there was no evidence that the killing was done with any particular "style."

Upon hearing this collection of highly prejudicial-and entirely circumstantial evidence, the jury returned a verdict finding Mr. McKinney guilty of first-degree murder. Pet. App. D at 116. He was sentenced to 26 years to life in prison. R.T. 1174.

After exhausting his state remedies, Mr. McKinney filed a federal habeas corpus petition. The District Court found that the admission of the character evidence had unduly prejudiced Mr. McKinney's trial, for "he was tried and convicted as much on evidence of his past history with knives as he was on evidence directly related to the murder." Pet. App. F at 157. Because of this, and the fact that the "evidence against [McKinney] was entirely circumstantial, and was far from overwhelming," the District Court ruled that Mr. McKinney was "deprived of his right to a fundamentally fair trial under the Due Process Clause of the Constitution of the United States." Pet. App. F at 157-158. Based upon this Due Process Clause violation, the District Court granted Mr. McKinney's habeas corpus petition. Pet. App. F at 160-161.

The State appealed this decision to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals upheld the District Court's ruling, similarly finding that the introduction of character evidence had rendered Mr. McKinney's trial fundamentally unfair. Pet. App. D at 135.

The State then filed its first Petition for a Writ of Certiorari to this Court. The Petition was granted, the judgment below was vacated, and the case was remanded back to the Court of Appeals for reconsideration in light of this Court's decision in

Estelle v. McGuire, ___ U.S. ___, 112 S.Ct. 475 (1991). Pet. App. C at 113.

On remand, the Court of Appeals carefully considered the application of Estelle v. McGuire to this case. The court again found for Mr. McKinney, holding that "the erroneous admission of propensity evidence rendered McKinney's trial fundamentally unfair in violation of the Due Process Clause . . . ." Pet. App. A at 104. The State again seeks review in this Court.

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REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner's application for a Writ of Certiorari should be denied. This case involves no new issues. It presents no burning controversies and, by its nature, is entirely fact-bound. Contrary to the State's Petition, the decisions below by no means "departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Pet. at 14-15 (quoting United States Supreme Court Rules, Rule 10.1.(a)). Rather, the District Court's and the Court of Appeals' grant of habeas corpus relief to Michael McKinney was a textbook application of settled legal doctrine.

1. The District Court And The Court Of Appeals Correctly Granted Habeas Corpus Relief Upon A Finding That The Admission Of Evidence Regarding Mr. McKinney's Past Ownership Of Knives And So-Called "Commando Lifestyle" Denied Mr. McKinney A Fundamentally Fair Trial, In Violation Of The Due Process Clause.

This Court has long held that criminal defendants are entitled to a fundamentally fair trial. See Lisenba v. California, 314 U.S. 219, 236 (1941); United States v. Lovasco, 431 U.S. 783, 790 (1977). In deciding whether Mr. McKinney was entitled to habeas corpus relief, the courts below simply followed this Court's two-step analysis. First, the courts determined whether the admission of the propensity evidence was an error of such magnitude that it violated the defendant's right

to a fundamentally fair trial, as guaranteed by the Due Process Clause of the Fourteenth Amendment. See Lisenba, 314 U.S. at 236. Second, if so, the courts asked whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, ___ U.S. ___, 113 S.Ct. 1710, 1713 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).[1]

This Court has defined the denial of due process in a state criminal trial as the "failure to observe that fundamental fairness essential to the very concept of justice . . . [where] the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." Lisenba, 314 U.S. at 236; see also Lovasco, 431 U.S. at 790. The Court of Appeals properly applied this basic standard. In order to determine whether Mr. McKinney was denied "that fundamental fairness essential to the very concept of justice," the Court of Appeals examined the history of the traditional principle barring the admission and use of propensity evidence. The Court of Appeals traced the principle back to seventeenth-century England and to the American colonies, and further noted that the principle is established not only in the Federal Rules of Evidence, but also in the laws of all fifty States. Pet. App. A at 83-85 & n.2. The court expressed the fundamental fairness test as "whether, under the facts of this

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[1] The District Court found that Mr. McKinney "would probably not have been convicted" without the propensity evidence. Pet. App. F at 158. The Court of Appeals specifically applied Brecht, which was decided while this case was on appeal. Pet. App. A at 104-109.

case considered as a whole, the admission of irrelevant character evidence did violate due process." Pet. App. A at 99.

The Court of Appeals then analyzed the character evidence in the context of the facts of the case as a whole, and found that it "served only to prey on the emotions of the jury, to lead them to mistrust McKinney, and to believe more easily that he was the type of son who would kill his mother in her sleep without much apparent motive." Pet. App. A at 102. "The jury was offered the image of a man with a knife collection, who sat in his dormitory room sharpening knives, scratching morbid inscriptions on the wall, and occasionally venturing forth in camouflage with a knife strapped to his body." Id. Finding the trial thus "impermissibly tainted," the Court of Appeals ruled that the "erroneous admission of propensity evidence rendered McKinney's trial fundamentally unfair in violation of the Due Process Clause . . . ." Pet. App. A at 103-104.

Contrary to the State's assertions, there was no attempt by the Court of Appeals to create a new, widely applicable "per se" rule. Pet. at 33-34. Indeed, the Court of Appeals was extremely careful to limit its analysis to the facts of this case. The Court of Appeals, after close analysis, found that the admission of the "commando lifestyle" and knife evidence deprived Mr. McKinney of a fundamentally fair trial, because he was convicted on the basis of this evidence. This is the only holding that comes out of this unremarkable case.

The decision below was also fully consistent with rulings in other Circuits. In rare cases, other Circuits have found that evidentiary errors, such as the introduction of propensity

evidence, have denied a defendant a fundmentally fair trial. See, e.g., Osborne v. Wainwright, 720 F.2d 1237 (11th Cir. 1983) (remand to decide whether admission of exceptionally gruesome photographs in a closely balanced case so inflamed the jury as to deny defendant a fundamentally fair trial); Walker v. Engle, 703 F.2d 959 (6th Cir.), cert. denied, 464 U.S. 951 (1983) (cumulative effect of evidentiary errors denied fundamental fairness); Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. Unit B 1981) (admission of evidence of a prior conviction had only gone to propensity and had denied defendant a fundamentally fair trial); Bisaccia v. Attorney General of New Jersey, 623 F.2d 307 (3d Cir.), cert. denied, 449 U.S. 1042 (1980) (admission of evidence of co-conspirator's guilty plea violated due process). To decide the fundamental fairness questions in the above cases, the Courts of Appeals undertook the same analysis that the court below did in this case. The court below engaged in a highly fact-specific analysis of the case as a whole to determine whether fundamental fairness was violated.

Upon concluding that the admission of character evidence deprived Mr. McKinney of a fundamentally fair trial, the Court of Appeals moved to the second step in the analysis: whether the introduction of the propensity evidence was harmless error under the standard announced in Brecht v. Abrahamson, ___ U.S. ___, 113 S.Ct. 1710 (1993). In Brecht, this Court held that a federal court, upon a finding of error that may merit habeas corpus relief, must determine whether the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht, 113 S.Ct. at 1713 (quoting Kotteakos). The court below

faithfully applied this test, and found that "the erroneously admitted character evidence was . . . just the sort of evidence likely to have a strong impact on the minds of the jurors." Pet. App. A at 106.

Not content with this result, the State now wants this Court to revisit the harmless error test, even though Brecht was decided only last term. Pet. at 39. The State seems to want to fold the fundamental fairness inquiry and the harmless error inquiry into an sufficiency of the evidence test based on Jackson v. Virginia, 443 U.S. 307 (1979). See Pet. at 38-39. The State argues that for McKinney to be entitled to habeas corpus relief, he must show that after "excluding the character evidence, the [evidence] would not be substantial enough to allow a reasonable trier of fact to rationally conclude he was guilty . . . ." Id. There is no reason to revisit Brecht now, only seven months after it was decided, and before there is any indication that there is confusion in the lower courts about Brecht's application.

Furthermore, the State's proposed test simply makes no sense in this context. The problem with Mr. McKinney's trial was that the jury heard inflammatory testimony that influenced the way the jury considered the rest of the evidence. The Jackson v. Virginia standard does not relate to tainted evidence that injects the jury's deliberation; rather, courts applying Jackson ask whether the quantum of evidence presented was sufficient for conviction. Applying the Jackson test when inflammatory evidence has been introduced would invite a court to guess how a hypothetical jury would have functioned had that jury not heard the tainted evidence. Such a course would ignore the real impact

of the prejudicial evidence upon the actual jury. It is not possible to apply some sort of "rational jury" standard, because the introduction of propensity evidence made it likely that Mr. McKinney's actual jury was not functioning like a hypothetical rational jury.

In sum, having found that the admission of the knife evidence and the "commando lifestyle" testimony so poisoned Mr. McKinney's trial as to make it fundamentally unfair, and that this unfairness had "substantial and injurious effect or influence in determining the jury's verdict," the courts below granted Mr. McKinney's Petition for a Writ of Habeas Corpus. This is all that the courts below did. No new rules were created, and the grant of relief certainly did not "depart[] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." United States Supreme Court Rules, Rule 10.1.(a). Because the courts below uncontroversially applied settled doctrine, the Petition for a Writ of Certiorari should be denied.

2. The District Court's And The Court of Appeals' Grant Of Habeas Corpus Relief To Mr. McKinney Did Not Violate Teague v. Lane.

As discussed above, the courts below did nothing unusual, new, or "stealthy" in this case. See Pet. at 55. No new rule of constitutional criminal procedure was created or applied. The courts below straightforwardly applied three settled doctrines in their grant of relief to Mr. McKinney. First, the courts below found that the admission of the knife and "commando lifestyle"

evidence had violated the centuries-old, universally accepted principle that prohibits the use of character evidence to show propensity. Second, the courts below found that, upon an analysis of the facts of the case as a whole, the admission of the character evidence had rendered the trial fundamentally unfair, in violation of the Due Process Clause. This constitutional rule also is not new. For many years, this Court has held that the Due Process Clause guarantees defendants the right to a fundamentally fair trial. See Lisenba v. California, 314 U.S. 219 (1941); United States v. Lovasco, 431 U.S. 783 (1977). Third, the courts below applied the Brecht harmless error test, concluding that the Due Process error had a "substantial and injurious effect or influence in determining the jury's verdict." Pet. App. A at 108 (quoting Brecht, 113 S.Ct. at 1713 and Kotteakos, 328 U.S. at 776). Applying the tests required by this Court's precedents to the facts of this case, the courts below granted relief. Thus, since there was no "new" rule applied, there was no violation of Teague v. Lane.[2]

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[2] Furthermore, even if this Court somehow considers the decision below to state some new rule, this case also fits within an important exception to the Teague doctrine. This exception allows for the retroactive application of a new rule of constitutional criminal procedure if it reviews trial procedures that "implicate the fundamental fairness of the trial." Teague, 489 U.S. at 312 (O'Connor, J.). In Teague, Justice O'Connor cited Justice Harlan's point in Desist v. United States, 394 U.S. 244 (1969) that "one of the principal functions of habeas corpus was 'to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted,' and . . . 'from this that all "new" constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas.'" Teague, 489 U.S. at 312 (O'Connor, J.) (quoting Desist, 394 U.S. at 262).

The fundamental fairness principle at issue in Mr. McKinney's case is just such a rule, for it assures that a

In any event, the State has waived any possible defense based on Teague. Teague was decided by this Court on February 22, 1989, while Mr. McKinney's habeas corpus petition was still pending before the District Court. Although Teague was decided four years ago, the first time the State raised Teague was in its second Petition for Rehearing and Suggestion for Rehearing En Banc in the Ninth Circuit, filed on June 21, 1993. In the meantime, the State missed at least seven opportunities to raise the defense. The State failed to raise Teague in its district court pleadings. It failed to raise Teague in its Opening and Reply Briefs in the Court of Appeals. The State failed to raise Teague in its initial petition for rehearing and suggestion for rehearing en banc, filed in 1990. It did not raise Teague in its first Petition for a Writ of Certiorari to this Court. The State omitted Teague from the two Supplemental Briefs that it filed in the Court of Appeals upon remand from this Court. The first time that Petitioner raised Teague was in its second petition for rehearing and suggestion for rehearing en banc, filed in 1993. Teague is not jurisdictional, and the State's failure to raise Teague amounts to a waiver. See Collins v. Youngblood, 497 U.S. 37, 41 (1990); Parke v. Raley, ___ U.S. ___, 113 S.Ct. 517, 521 (1992); see also Godinez v. Moran, ___ U.S. ___, 113 S.Ct. 2680, 2685 n.8 (1993) (Blackmun J., dissenting). Based on the State's

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defendant will be convicted on the relevant facts presented at trial, and not on the basis of his or her potential propensities or "lifestyle." Thus, even if the Court of Appeals' application of the fundamental fairness doctrine to the facts of this case could somehow be considered a new rule, it should be applied retroactively to Mr. McKinney because of the grave due process concerns involved.

failure to raise Teague for over four years, it should not be permitted to raise it at this late date. Thus, the State's Teague claim should be deemed waived.

3. The District Court's And The Court Of Appeals' Determinations Regarding The Legal Relevance Of The Knife And "Commando Lifestyle" Evidence Did Not Violate Sumner v. Mata.

In its Petition, the State argues that in reviewing Mr. McKinney's case on direct appeal, the California Court of Appeal drew inferences from the knife and "commando lifestyle" evidence and that, under Sumner v. Mata, 449 U.S. 539 (1981), these inferences must be respected by the federal courts.[3] This argument is founded upon a misreading of the California court's opinion in this case.

On direct appeal, Michael McKinney challenged the legal relevance of the character evidence, as well as the constitutionality of its use. The state appellate court analyzed Mr. McKinney's relevance argument and rejected it, finding that the knife and "commando lifestyle" evidence were legally relevant to the prosecution's case. Pet. App. I at 193-203. Relevance, the State admits, is a legal issue, not a factual determination, and is thus outside the scope of Sumner v. Mata. Pet. at 62.

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[3] Interpreting 28 U.S.C. § 2254(d), Sumner v. Mata stands for the proposition that in habeas corpus matters, federal courts are bound to accept the "factual determinations of all state courts." 449 U.S. at 547. Section 2254(d) states that "a determination after a hearing on the merits of a factual issue . . . shall be presumed to be correct . . . ."

Because relevance is a legal question, a state court's determination of relevance is reviewable by a federal court.

Thus, because the state court's findings were inextricably linked to the legal issue of relevance, the federal grant of relief did not violate 28 U.S.C. § 2254(d) or Sumner v. Mata.

4. The District Court And The Court Of Appeals Correctly Ruled That The Knife And "Commando Lifestyle" Evidence Was Not Legally Relevant To Any Essential Elements Of The Prosecution's Case.

In Estelle v. McGuire, ___ U.S. ___, 112 S.Ct. 475 (1991), this Court held that in a case against a man accused of murdering his infant daughter, the admission of evidence regarding the infant's previous injuries did not make the trial fundamentally unfair. The challenged evidence included two physicians' testimony that the prior injuries suffered by the infant could only have been intentionally inflicted, and that the infant "was a battered child." Id. at 478. Finding that the evidence went toward the crucial element of intent, and was thus relevant, the Supreme Court reversed the Ninth Circuit's grant of habeas corpus relief to McGuire.

The Court remanded Mr. McKinney's case for reconsideration in light of Estelle v. McGuire. On remand, the Court of Appeals carefully considered Estelle, and found that it did not control this case. Indeed, no Estelle-type situation even remotely exists here. The court below premised its discussion on the point reiterated in Estelle that "'the category of infractions

that violate "fundamental fairness"' is a very narrow one." Pet. App. A at 81 (citation omitted). In its discussion of the facts, the court below further noted that "[i]n Estelle, the Supreme Court found that the 'battered child syndrome' evidence was relevant to the intentional nature of the injuries that killed the child, a fact of consequence." Pet. App. A at 82. Thus, the court noted that the battered child evidence at issue in Estelle "was admissible to prove intent." Pet. App. A at 90.

By contrast, in this case, the fact that Mr. McKinney once owned double-edged daggers, or wore camouflage pants (which were a fad at his college) does not show anything remotely resembling intent, or any other fact of consequence. Nor does the evidence show anything like motive or modus operandi. Rather, this evidence, unlike the evidence at issue in Brecht, was found to be entirely irrelevant. The only purpose of this evidence was to paint a picture for the jury of Mr. McKinney as a crazed commando-type "who sat in his dormitory room sharpening knives, scratching morbid inscriptions on the wall, and occasionally venturing forth in camouflage with a knife strapped to his body." Pet. App. A at 102. It is exactly this prosecutorial tactic that the principle against the use of propensity evidence was designed to prevent. Thus, the grant of habeas corpus relief was perfectly appropriate.

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CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

November 11, 1993

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
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REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the introduction of character evidence to show propensity in a closely-balanced case constitutes *per se* a violation of Due Process and, if so,

2. Is the application of such a rule contrary to *Teague v. Lane*, 489 U.S. 288 (1989) as applying a "new rule" for the first time on collateral review?

3. If a state appellate court has found that permissible inferences were raised by certain evidence and that the evidence was probative of issues in dispute, are such findings binding under *Sumner v. Mata*, 449 U.S. 539 (1981), as facts which the collateral reviewing court must treat deferentially or are such findings legal conclusions which the collateral reviewing court can completely ignore?

4. Separately, does the failure by the collateral reviewing court to recognize the permissible inferences found by the state appellate court violate this Court's holding in Estelle v. McGuire, 502 U.S. ___, 112 S. Ct. 475, 116 L.Ed.2d 385 (1991) by ignoring the permissible inferences to be drawn from the introduction of the evidence, rather than, as in Estelle, finding that the permissible inferences do not relate to a matter in dispute.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ANA M. OLIVAREZ, WARDEN OF THE DEUEL VOCATIONAL INSTITUTION OF THE STATE OF CALIFORNIA,

Petitioner

v.

MICHAEL SHERIDAN MCKINNEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(AFTER GRANT OF CERTIORARI AND REMAND)

REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

Petitioner intends, in this reply brief, only to address new matters raised in "Respondent's Brief in Opposition, etc." (hereinafter referred to as "opposition") which impact upon matters contained in the petition for writ of certiorari. This reply brief will not address the merits of arguments in the

opposition that petitioner concludes have been adequately refuted by the petition itself. Accordingly, the fact that a matter contained in the opposition is not addressed in this reply is not meant as a concession as to the accuracy or merit of that point.

ARGUMENT

I

THE OPPOSITION VALIDATES THE NECESSITY FOR THE CREATION OF A SPECIFIC TEST TO DETERMINE WHETHER A TRIAL IS FUNDAMENTALLY UNFAIR

In the petition for writ of certiorari, petitioner argued that the term "fundamentally unfair," as has been applied to bar the introduction of ordinary evidence in a state criminal trial that offends no other specific constitutional guarantee, is in need of a specific test delineating when it can be said to exist. Petitioner submitted that a lack of "fundamental fairness" can only be occasioned by the introduction of evidence at a state criminal court trial where the evidence 1) has no logical relationship to the question of guilt or innocence, and, 2) creates a strong tendency to convict the defendant for

reasons other than his guilt or innocence of the charges upon which he was tried, and, 3) nullifies the defendant's right to a fair trial as shown by the fact that in the absence of the introduction of the evidence, no rational jury would have convicted him. Petn., pp. 51-52.

Petitioner's plea for the need for such a test was occasioned by the decision below where the Ninth Circuit utilized the fact that there was no definition of the term to deem the admission of knife evidence to be "fundamentally unfair" in a knife killing case. In the first section of his opposition, respondent attempts to argue that the admission of the evidence was "fundamentally unfair." However, in so doing, respondent helps to illuminate the breath of discretion possessed by federal habeas reviewing courts under this undefined test and the

need for a defining test.

Respondent argues that the Ninth Circuit "simply" followed a two-step analysis of whether the admission of the alleged propensity evidence was "an error of such magnitude" that it violated his right to a fundamentally fair trial and whether the "error" had a substantial and injurious effect on the verdict. Opposition, pp. 7-8. However, one might ask for clarification of the word "error."

Certainly, by "error," petitioner cannot be referring to state law error because Estelle v. McGuire, 502 U.S. ___, 112 S.Ct. 475, 480 (1991), the decision in light of which this case was remanded back to the Ninth Circuit for further consideration, plainly held that an "error" under state law is no guide in determining the propriety of the admission of evidence at the state court level on a

petition for writ of habeas corpus under 28 U.S.C. § 2254.

More certainly, by "error," respondent cannot be referring to federal law error, because neither respondent nor the Ninth Circuit has been able to point to any federal statute prohibiting the introduction, in state court criminal trials, of propensity evidence.

Lastly, by "error," petitioner cannot be referring to some federal "constitutional evidence code" because it does not exist. This illuminates the fact that fundamental unfairness can only be defined as fundamental unfairness itself and not as any independent error. It means, correspondingly, "fundamental unfairness," as illustrated by the case at bar, means whatever the subjective opinion of the federal habeas reviewing court deems it to be. This, in turn, means that

"error" exists in the introduction of ordinary evidence in state court criminal trials whenever the federal habeas corpus reviewing court forms the subjective opinion that the evidence introduced is "unfair."

Even respondent's use of the phase, "an error of such a magnitude," in his recapitulation of the finding of the Ninth Circuit causes question. Opposition, p. 7. The word, "magnitude," has its origins in the french word *magnus*, meaning "great." However, the Ninth Circuit did not claim to find any "great" error that is necessary to designate a trial as being fundamentally unfair. Instead, it merely found that the case was "closely-balanced" and that it was "more than reasonably likely that the jury did not follow its instructions to weigh all the evidence carefully." See Petn., Appendix A, pp.

103-104.

For respondent, this means his assertion that the Ninth Circuit found some error of "magnitude" is incorrect. For petitioner, it demonstrates that the gravity of the above concern, that federal habeas reviewing courts are allowed to find due process error merely because they subjectively believe the evidence to be inadmissible or improper, regardless of what a state court believes, and measure "fundamental unfairness" by whether 1) the case is "closely balanced" and 2) it is "reasonably probable" that the jury credited the evidence.

Next, in the opposition, respondent, quoting Lisenba v. California, 314 U.S. 219, 236 (1941), defines due process error as the "'failure to observe that fundamental fairness essential to the very concept of justice . . . [where] the

absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial..'" However, it is petitioner who enthusiastically endorses this definition and it is the Ninth Circuit that has cast it aside.

The state appellate court found that respondent's possession of, fascination with, and use of knives was probative on whether he possessed whatever missing knife was responsible for the murder or whether he had truly rid himself of his knives prior to the murder. See Petn., Appendix I. Ignoring this, the Ninth Circuit found that the evidence was offered simply to show that respondent was more likely to have committed the murder because of his past association with knives.

Setting aside the question of

deference to state court findings, the Ninth Circuit simply found the evidence to be "unreliable." This is a far cry from finding a "failure [of] fairness essential to the very concept of justice," or something that "fatally infected" the trial, or an action "of such quality as necessarily prevents a fair trial." To the contrary, as shown above, the Ninth Circuit's finding was of no such "magnitude" as it simply found that in its opinion the evidence was "unfair" and that it was "reasonably probable" that the jury gave weight to the evidence in this closely balanced case. Accordingly, it is the Ninth Circuit that has betrayed Lisenba, not petitioner.

Next, respondent tries to convince this Court that "propensity evidence" is "fundamentally unfair" because "the principle is established not only in the

Federal Rules of Evidence, but also in the laws of all fifty states."[1] Opposition, p. 8. However, if respondent were correct, then the Due Process Clause would not only be known to guarantee that each person not be deprived of life, liberty, or property "without due process of law" but to include the addendum "or any other right contained in any legislative rule recognized by all jurisdictions in the nation." This is clearly not the case. Policy determinations made by bodies with

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1. In some respects, the Ninth Circuit's and petitioner's reliance on the law in all fifty states is a red herring. All fifty states have rules of evidence that allow for the admission of habit and custom evidence, which, along with their holding that the evidence was admissible to show issues in dispute, formed the basis of the judgment of the California Court of Appeal in this case that the evidence was properly admitted. However, the Ninth Circuit disagreed with the state court on this issue, although as will be shown infra they ignored the state court findings, thereby forcing the "propensity" issue in this case.

rule-making, and thus policy determining, powers are not synonymous with constitutional principles. Moreover, whether or not a state rule of evidence has been rejected by other states has never been, intrinsically, a basis for a finding of a due process violation. See, e.g., Chambers v. Mississippi, 410 U.S. 284, 298-300 (1973) [fact that other states no longer adhered to property interest exception to hearsay rule did not, by itself, establish due process violation.]

Next, like the toddler who offers his mother a cookie after being caught raiding the cookie jar, respondent attempts to convince this Court that the evidence offered against him "really should not have been admitted," thereby hoping that this Court will repeat the same error of the Ninth Circuit in

substituting its own subjective assessment of the decision to admit the evidence for that of the state trial court. See Opposition, p. 9. However, in so stating, petitioner fails to address the essential thrust of the petition which is that whether propensity evidence should be admitted is a policy determination as long as the evidence is 1) relevant and, 2) bears on guilt or innocence. Whether the evidence is, as the Ninth Circuit deemed it, "too relevant," or "likely to be overvalued," or "untrustworthy," or "likely not to be put in proper perspective by the lay jury," is a policy and legislative, not a judicial, prerogative.

Thus, the Ninth Circuit has forgotten a fundamental tenet of due process review: "[T]he Bill of Rights speaks in explicit terms to many aspects

of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." Medina v. California, 505 U.S. ____, 112 S.Ct. 2572, 2576, 120 L.Ed.2d. 353 (1992). The latter sentence could also be correctly redrafted to refer to the "careful balance that the Constitution strikes between the rights of the States to conduct their trials and the power of the Writ to ensure compliance with the federal constitution."

Next, in his opposition, respondent concedes that findings that the admission of ordinary evidence rendered a trial fundamentally unfair are "rare," a concession which seems itself oddly

incongruous in the context of the defense of a decision that has found the introduction of "knife evidence" to be fundamentally unfair in a "knife killing case."

In any case, respondent lists as examples of such "rarities" four cases, three of which are perfectly explicable in light of petitioner's proposed test. First, respondent lists Osborne v. Wainwright, 720 F.2d 1237 (11th Cir. 1983), which respondent characterizes as a "remand to decide whether admission of exceptionally gruesome photographs in a closely balanced case so inflamed the jury as to deny a fundamentally fair trial." Opposition, p. 10. However, normally, such gruesome photographs would 1) not bear logically, in most contexts, on the question of guilt or innocence, 2) have a strong tendency to convict the defendant

for reasons other than the defendant's guilt, i.e., out of sympathy for the victim(s), and 3) if it could be said that no rational jury would have convicted the defendant in the absence of the photographs, then the trial was fundamentally unfair.

Respondent also noted the case of Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. 1981) which he summarizes as "admission of evidence of a prior conviction had only gone to propensity and had denied defendant a fundamentally fair trial." Opposition, p. 10. However, a prior adjudication of guilt in an unrelated proceeding may 1) not having any bearing on the defendant's guilt in the present proceeding, and 2) might have a strong tendency to convict the defendant for reasons other than his guilt on the present charges - i.e., based on the prior

adjudication, which 3) would be fundamentally unfair if it could be said that in the absence of the admission of evidence of the prior adjudication, no rational jury would have convicted him.

The difference between Panzavecchia and the instant case is that here the knife evidence 1) does bear logically on whether respondent had the weapons to commit the crime on its date, and, 2) had a tendency to convict respondent that was solely generated by suspicion that he in fact committed the crime for which he was being tried, and was such that 3) a rational jury could have convicted respondent even in the absence of the evidence.

Lastly, respondent notes the case of Bisaccia v. Attorney General of New Jersey, 623 F.2d 307 (3rd Cir. 1980), which he summarizes as "admission of

evidence of co-conspirator's guilty plea violated due process." In his summation, respondent neglected to add that the evidence of the co-conspirator's plea was admitted as substantive proof of the defendant's guilt and without a limiting instruction. Therefore, it can easily be seen that 1) a guilty plea by an alleged co-participant motivated by varied considerations might have no logical bearing on another person's guilt or innocence, but that 2) such evidence would have a strong tendency to convict the defendant for reasons other than his guilt on the charges, i.e., because of the co-participant's admission of guilt, and, therefore, 3) if no rational jury could have convicted the defendant absent the admission of the plea, the defendant would have been denied a fundamentally fair trial. As such, petitioner's test is

workable and should be adopted by this Court.

Next, respondent mischaracterizes petitioner's position as seeking to substitute the sufficiency of evidence test in Jackson v. Virginia, 443 U.S. 307 (1979) for the harmless error test in Brecht v. Abrahamson, 113 S.Ct. 1710 (1993). Respondent has a hopelessly garbled understanding of the petition.

Petitioner never urged replacing the Brecht harmless error test with the Jackson test because petitioner cannot imagine how a "fundamentally unfair" trial can ever be harmless. Petitioner's test was to define "fundamental unfairness;" not to suggest a test for determining when it can be harmless.

As stated above, petitioner urges that a federal habeas reviewing court, when contemplating whether the admission

of ordinary evidence works to violate due process, determine 1) whether the evidence is at all logically relevant to the question of guilt or innocence, if so, its admission is not fundamentally unfair, and 2) if the evidence has a strong tendency to tempt the jurors to convict the defendant for reasons other than his guilt on the charges for which he is being tried, if not, its admission is not fundamentally unfair, and 3) lastly, whether it can be said that in the absence of the evidence, no rational jury would have convicted the defendant. If the answer to those three questions are 1) no, 2) yes, and, 3) yes, then the trial was fundamentally unfair and no harmless error test is needed.

II.

THERE HAS BEEN NO TEAGUE V. LANE WAIVER

In the second section of his opposition, respondent argues that the decision of the Ninth Circuit does not create a "new rule" under Teague v. Lane, 489 U.S. 288 (1989), that if it does, it fits one of the exceptions, and, even if no exception is present, petitioner has "waived" his right to assert Teague by not raising it before. Petitioner, has answered the first two contentions in the petition and the third contention lacks gravity.

Respondent does not explain how a party can be said to have "waived" Teague when that party asserts Teague on a petition for certiorari immediately after the challenged decision is issued. Clearly, petitioner could not have

asserted Teague prior to the issuance of the decision.

Respondent, however, argues that petitioner could have asserted Teague as early as in the litigation in the United States District Court. Respondent forgets, however, that the ruling of the district court, as well as the first ruling of the Ninth Circuit, was predicated on McGuire v. Estelle, 902 F.2d 749 (1990). When this Court issued its ruling in Estelle v. McGuire, supra, gone was the legal underpinning of the decisions of both the United States District Court and the Ninth Circuit.

In fact, it was precisely because McGuire had been overruled that the Ninth Circuit found it necessary to create a new rule. As the Ninth Circuit itself stated, "Thus, we address the question left unanswered in Estelle . . .." Petn.,

Appendix A, p. 99. As such, the simple answer to respondent's assertion that petitioner should have raised Teague earlier is that the "new rule" complained of was only created in the decision that is the subject of the petition and did not exist earlier. This is especially true since the Ninth Circuit had to reject Petitioner's argument that the evidence was properly admitted in order to create its new due process rule of evidence. Accordingly, respondent's argument that petitioner "waived" Teague clearly lacks merit, even without consideration of whether Teague is waivable or the other interesting question of how respondent could possibly show any prejudice or detriment by reason of the alleged waiver.

III.

THE DECISION VIOLATES ESTELLE V. MCGUIRE AND SUMNER V. MATA

Respondent also argues that the decision of the Ninth Circuit neither violated Sumner v. Mata, 449 U.S. 539 (1981) or Estelle v. McGuire, supra. Opposition, pp. 15-17. Respondent's arguments are easily dispatched.

First, as to Sumner v. Mata, respondent merely states that the question of relevance is one of law and ends his argument immediately thereafter. He fails to address the argument in the petition that factual inferences, that rendered such evidence relevant, drawn by the state appellate court and entitled to deference by the federal habeas reviewing court, were ignored by the decision. Given his refusal to address this issue, respondent has made only a perfunctory and not

serious rebuttal of petitioner's contention that the decision violated Sumner v. Mata.

The same is true of respondent's argument that the decision does not violate Estelle. Respondent, as did the Ninth Circuit, ignores and does not even address the findings of the state appellate court. Those findings listed the legal relevance of all pieces of evidence challenged by respondent on federal habeas corpus. Rather than addressing those inferences raised and demonstrating their deficiencies, if any, respondent simply ignores them; almost in concession that those inferences found by the state appellate court rendered the evidence relevant to prove matters in dispute.

At best, therefore, respondent's act of ignoring the state appellate court

findings is an assertion by him that the Ninth Circuit "was not bound to consider the inferences found by the state appellate court," which, in turn, is precisely the reason that the decision violates Estelle v. McGuire, supra, where the Ninth Circuit found did not credit the fact that the State had offered the battered child syndrome evidence to show intent.

* * * * * *

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Petition for Writ of Certiorari should be granted.

DATED: November 23, 1993

Respectfully Submitted,

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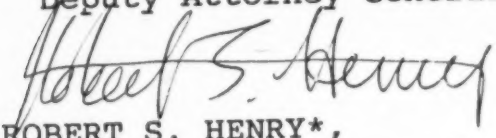

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